

# TRANSCRIPT OF RECORDS

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SUPREME COURT OF THE UNITED STATES

DECEMBER TERM 1912

No. 517.

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OKLAHOMA STATE BANK OF ASHLEY CENTER  
OF APPELL ET AL. APPELLANTS

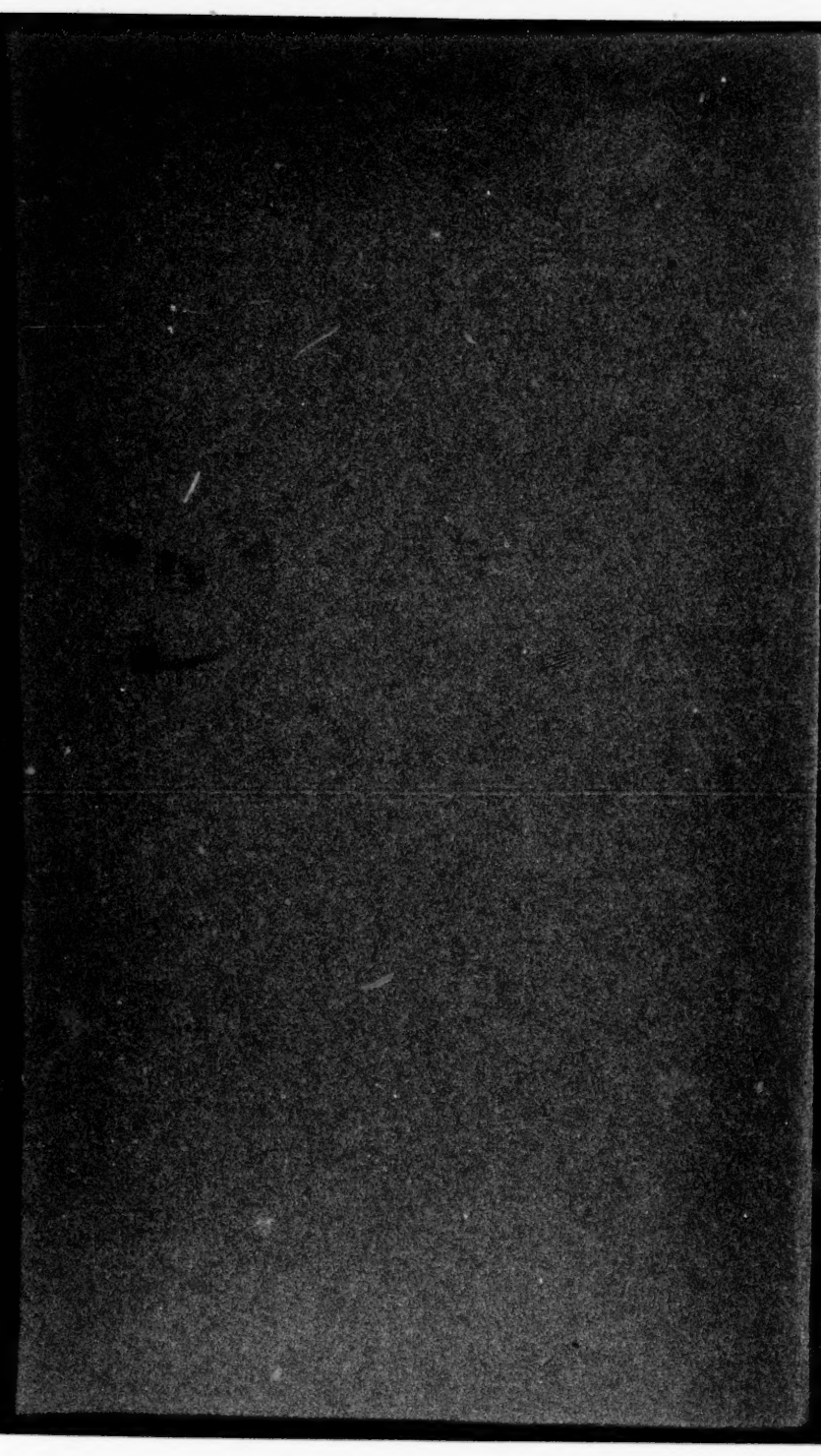
JOSEPH B. HOLLEY, AS BANK COMMISSIONER OF  
STATE OF KANSAS, AND MARK TULLY, AS  
TREASURER OF THE STATE OF KANSAS

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF KANSAS

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FILED JUNE 22, 1913.

(22,238.)





## I.

That your orators and each of them are corporations duly organized, existing and doing business under and by virtue of the banking laws of the State of Kansas and have been so organized, existing and doing business since long prior to March 6, 1909.

That the defendant, Joseph N. Dolley, is and at all of the times hereinafter mentioned was the duly appointed, qualified and acting Bank Commissioner of the State of Kansas.

That the defendant, Mark Tully, is and at all of the times hereinafter mentioned was the duly elected, qualified and acting State Treasurer of the State of Kansas.

That the defendants Joseph N. Dolley, and Mark Tully as such officers are made defendants herein for the reason that they are charged with the duties and responsibilities of enforcing certain provisions of the banking act of the State of Kansas, approved March 6, 1909, and hereinafter referred to.

## II.

That the matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars and arises under the Constitution of the United States and the laws of the United States.

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## III.

That on and prior to the matters hereinafter complained of there existed in the state of Kansas a banking act which took effect March 11th, 1897, entitled as follows: "An Act relating to banks and banking; providing for the organization, management, control, regulation and supervision of banks, and providing penalties for violation of the provisions of this act, and repealing Chapter 43 of the Laws of 1891;" and which said banking act with amendments thereto, up to and including the special session of 1908, contained general provisions for the organization, government and regulation of state banks in the state of Kansas, and which said banking laws of the state of Kansas did not have application to National Banks, and National Banks were in no manner attempted to be controlled or governed thereby.

In said banking laws of the state of Kansas last above referred to, there were no provisions of any kind or nature relating to the creation of a guaranty fund for security of depositors, and no provision by which any of the said banks so organized under the laws of the state of Kansas were required, or could be required to make any deposits with the state treasurer of either bonds or money, or submit to any assessments for the creation of a guaranty fund for the securing of deposits as in the act of the state of Kansas subsequently passed, and hereinafter more particularly complained of.

That at the time when the existing state banks in the state of Kansas (including complainants) were severally organized, the said statute laws of the state of Kansas provided (section 10) that "the shareholders of every bank organized under this act shall be addi-

tionally liable for a sum equal to the par value of stock owned, and no more"; and there was no provision in the said banking laws by which any of the assets of any of the said banks of any kind or nature should be appropriated by the Bank Commissioner or by the state treasurer, or by any other person in any manner or form for the purpose of paying claims of depositors in any other bank or banks, and that such appropriation of bonds, money or assets of any of the said banks (including complainants) would have been a violation of the provisions of the said banking laws of the state of Kansas, and more particularly in violation of the provisions of Sections 10 and 11 of the said banking laws.

7 In case of insolvency of any of the said state banks, it is provided in Section 28 of the said banking act that all moneys arising from the assets of the said bank or banks, including the moneys realized from the stockholders thereof, should be paid to the creditors of the bank without discrimination or preference as between such creditors, and that each and all of the said banks (including complainants) became organized and entered upon the banking business and obtained credit and deposits and assumed obligations under the provisions of said banking laws by which each and singular of such creditors should receive an equal pro rata proportion of the assets of any of the said banks in case of insolvency; and that complainant banks, relying upon said laws, and acting in good faith thereunder, have made deposits with other state banks and have given credit to other state banks in good faith, relying upon the laws of the state of Kansas to the end that in the event of the insolvency of any bank or banks to which complainants have so extended credits, or with whom they have made deposits such bank or banks would be liable unto these complainants for the payment of a pro rata share of the assets of such insolvent banks (including the liability of stockholders) and without any preferential claim in favor of private depositors, as hereinafter more particularly complained of.

That under the said banking laws of the state of Kansas, it is provided that the Bank Commissioner should issue to each of the state banks a certificate showing that said banks were entitled and authorized to transact a general banking business, as provided therein, and that each and singular of the said state banks (including complainants) received such certificate, and under and by virtue of the right and authority therein and thereby vested in the said banks they have ever since the receiving of said certificates severally continued in the banking business, and were and are of right entitled to continue in said banking business.

That under the banking laws of the state of Kansas the right of persons, firms or associations to do a banking business was recognized and authorized, and that under and by virtue thereof there have heretofore been organized, and are now existing, private banks in the State of Kansas, which are denied the privileges of the act hereinafter complained of.

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## IV.

That on or about the 6th day of March, 1909, the legislature of the State of Kansas passed an act entitled: "An act providing for the security of depositors in the incorporated banks of Kansas, creating the bank depositors' guaranty fund of the state of Kansas and providing regulations therefor, and penalties for the violation thereof; which act is Chapter 61 of the Session Laws of Kansas of 1909.

That by Section 1 of said act it is, among other things, provided that, "any incorporated state bank having a paid up and unimpaired surplus fund equal to ten per cent. of its capital, and any bank which may after the passage of this act be authorized to do business in this State, and which shall have been actively engaged in the business of banking for at least one year," is authorized and empowered to participate in the assessments and benefits, and to be governed by the regulations of the bank depositors' guaranty fund of the state of Kansas in said act, "provided that the limitation of one year shall not prevent such participation by a new bank at any time in any city or town in which all banks shall have neglected or failed to become guaranteed banks under the provisions of this act, for a period of six months after the taking effect of this act."

The purpose and intent of the said provisions of the said Section 1 were to confine and limit the privileges of the said guaranty fund provisions of the said act to "incorporated" state banks and to exclude therefrom private banks and trust companies; and by way of inducement and indirect compulsion, to require all existing incorporated state banks to accept of the provisions of said act, it was provided, as above set forth, that if the existing banks in any city or town should neglect or fail to become guaranteed banks within the period of six months after the said act should go into effect, that a new bank might be organized in such city or town and immediately be permitted to become a guaranteed bank under the provisions of the said act and thereby be given the preferential rights and privileges, if any there be, under the said act, and to the detriment and disadvantage of the existing banks in said city or town.

9 That by Section 8 of said act it is further provided that trust companies and private banks and national banks, if they shall reorganize as incorporated state banks may become guaranteed banks by complying with the provisions of the said act as in said Section 8 directed and provided. The purpose and intent of said Section 8, coupled with the provisions of said Section 1, above referred to, was and is to require all trust companies and all private banks lawfully organized and doing business under the laws of the State of Kansas, and all national banks lawfully organized and doing business under and by virtue of the national banking laws of the United States to become incorporated state banks under the laws of the state of Kansas subject to the control of the Bank Commissioner of the state of Kansas, and by way of inducement thereto that they, when so reorganized, may become guaranteed state banks of the state of Kansas; otherwise that they shall be and are intended to be discriminated against under and by virtue of the said act of the State of Kansas of March 6th, 1909, herein complained of; and

by reason of the premises before stated, and others hereinafter to be referred to, the said act of the State of Kansas, while voluntary in form, is in its application, force and effect a compulsory law in that it compels all banks, private or incorporated, in the state of Kansas, and all trust companies in the state of Kansas, and all national banks in the state of Kansas, to become incorporated state banks of the state of Kansas, or be unjustly and unlawfully discriminated against, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, which provides, among other things; "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

## V.

In Section 1 of said act of March 6th, 1909, it is further provided as one of the preliminary proceedings for a bank to become a guaranteed bank that "a resolution of its board of directors, authorized by its stockholders," asking therefor shall be filed with the Bank Commissioner, and which said provisions by its terms in force and effect authorizes such resolution by a majority of a quorum of the board of directors when authorized by a majority of the stock present and voting at a regular or special stockholders' meeting, and

10 by reason whereof the stockholders not present and voting at such stockholders' meeting, and minority directors, and stockholders, although present and dissenting therefrom, are intended to be made powerless to prevent the said bank or banks from becoming guaranteed banks, and that said stockholders not present and voting, and stockholders present and dissenting therefrom and minority members of the board of directors are by the terms and provisions of said act deprived of property and of property rights without due process of law, and are denied the equal protection of the laws in violation of Section 1 of Fourteenth Amendment of Constitution of the United States which provides that "no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and is in violation of section 1 of the Bill of Rights of the Constitution of the State of Kansas, which provides, "All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness," and in violation of Section 2 of said Bill of Rights which provides, "all political power is inherent in the people, and all free governments are founded on their authority and are instituted for their equal protection and benefit."

## VI.

By section 2 of the said Bank Guaranty Law of March 6th, 1909 it is further provided that the banks, before receiving a certificate that they are entitled to the benefits of said act, as evidence of good faith shall deposit with the State Treasurer of the State of Kansas, subject to the order of the Bank Commissioner, United States bonds, or other bonds, as in said section provided, to the amount of "\$500

(22,238.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 617.

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK  
OF AXTELL, ET AL., APPELLANTS,

*vs.*

JOSEPH N. DOLLEY, AS BANK COMMISSIONER OF THE  
STATE OF KANSAS, AND MARK TULLEY, AS STATE  
TREASURER OF THE STATE OF KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF KANSAS.

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1 The United States of America to Joseph N. Dolley, as Bank Commissioner of the State of Kansas, and Mark Tulley, as

State Treasurer of the State of Kansas, appellees, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the day this Citation bears date, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the District of Kansas, wherein Assaria State Bank of Assaria, Citizens Bank of Axtell, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank, of Coats, State Bank of Colwich, Cloud County Bank, of Concordia, Danville State Bank, of Danville, State Bank of Downs, Downs, Union State Bank, of Downs, Falun State Bank, of Falun, Marion County State Bank, of Florence, Ford State Bank, of Ford, Citizens Bank, of Frankfort, Farmers State Bank, of Greensburg, Citizens State Bank, of Grenola, Bank of Hamlin, of Hamlin, Farmers & Merchants State Bank, of Harper, Farmers State Bank, of Hazelton, Morrill and Janes Bank, of Hiawatha, State Bank of Holton, of Holton, State Bank of Home City, of Home City, Bank of Horton, Iuka State Bank, of Iuka, Jamestown State Bank, of Jamestown, State Bank of Jennings, of Jennings, State Bank of Lancaster, of Lancaster, Exchange Bank of Lenora, McPherson Bank, of McPherson, Citizens State Bank of Medicine Lodge, Muscotah State Bank, of Muscotah, Olsburg State

2 Bank, of Olsburg, Peru State Bank, of Peru, First State Bank of Portis, Bank of Powhattan, Powhattan, Peoples Bank of Pratt, Sharon Valley State Bank of Sharon, South Haven Bank, of South Haven, Kendall State Bank, of Valley Falls, Security State Bank, of Wellington, Wilmore State Bank, of Wilmore, Farmers State Bank, of Whiting, Willis State Bank, of Willis, Bank of Winchester, of Winchester, Citizens Bank of Hazelton, are appellants, and you are appellees in appeal, to show cause, if any there be, why the judgment rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the Circuit Court of the United States for the District of Kansas, this 16th day of May in the year of our Lord one thousand nine hundred and ten.

JOHN C. POLLOCK,

*United States District Judge for the District of Kansas.*

Service of the foregoing citation is hereby acknowledged this 18th day of May, 1910.

F. S. JACKSON,

*Attorney General.*

A. C. MITCHELL,

G. H. BUCKMAN,

*Solicitors for Defendants Joseph N. Dolley,  
as Bank Commissioner, and Mark Tulley,  
as State Treasurer.*

3 [Endorsed:] No. 8816. U. S. Circuit Court, District of  
 Kansas. Assaria State Bank et al. vs. Joseph N. Dolley et al.  
 Citation. Filed May 16, 1910. Geo. F. Sharitt, Clerk.

4 In the Circuit Court of the United States for the District of  
 Kansas, First Division.

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL,  
 Baileyville State Bank, of Baileyville; First State Bank of Bellaire,  
 Citizens State Bank of Centralia, Citizens State Bank of Cheney,  
 Coats State Bank, of Coats; State Bank of Colwich, Cloud County  
 Bank of Concordia, Danville State Bank, of Danville; State Bank  
 of Downs, Downs; Union State Bank of Downs; Falun State  
 Bank, of Falun; Marion County State Bank of Florence, Ford  
 State Bank, of Ford; Citizens Bank of Frankfort; Farmers State  
 Bank of Greensburg; Citizens State Bank of Grenola; Bank of  
 Hamlin, of Hamlin; Farmers & Merchants State Bank of Har-  
 per; Farmers State Bank of Hazelton; Morrill and Janes Bank of  
 Hiawatha, State Bank of Holton, of Holton; State Bank of Home  
 City, of Home City; Bank of Horton, Iuka State Bank, of Iuka;  
 Jamestown State Bank, of Jamestown; State Bank of Jennings,  
 of Jennings; State Bank of Lancaster, of Lancaster; Exchange  
 Bank of Lenora, McPherson Bank, of McPherson; Citizens State  
 Bank of Medicine Lodge; Muscotah State Bank of Muscotah;  
 Olsburg State Bank, of Olsburg; Peru State Bank, of Peru; First  
 State Bank of Portis, Bank of Powhattan, Powhattan; Peoples  
 Bank of Pratt, Sharon Valley State Bank, of Sharon; South  
 Haven Bank, of South Haven; Kendall State Bank of Valley  
 Falls; Security State Bank of Wellington; Wilmore State Bank,  
 of Wilmore; Farmers State Bank of Whiting; Willis State Bank,  
 of Willis; Bank of Winchester, of Winchester; Citizens Bank of  
 Hazelton, Complainants,

vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas,  
 and Mark Tulley, as State Treasurer of the State of Kansas, De-  
 fendants.

### *Bill of Complaint.*

To the Honorable Judges of said Court in chancery sitting:

The above named complainants, each of which has its principal  
 place of business in the State of Kansas and in the town following  
 its name, bring this, their bill of complaint, on their own behalf and  
 on behalf of all other banks within the State of Kansas similarly  
 situated and who desire to join herein and share the benefits of this  
 proceeding against Joseph N. Dolley, as Bank Commissioner of the

5 State of Kansas, and Mark Tulley as State Treasurer of the  
 State of Kansas, both of the City of Topeka in the State of  
 Kansas, and thereupon your orators and each of them com-  
 plain and say:

for every \$100,000 or fraction thereof, of its average deposits eligible to guaranty (less its capital and surplus)" provided that each bank shall so deposit not less than \$500 and which bond shall be carried under the heading "Guaranty fund with State Treasurer." In lieu of bonds, the said banks may deposit money which shall be exchangeable for bonds at the option of the bank. In addition to said deposit "each bank shall pay in cash an amount equal to one-twentieth of one per cent of its average deposits eligible to guaranty,

less its capital and surplus, and the same shall be credited  
11 to the Bank depositors' guaranty fund with the state treasurer," subject to the order of the Commissioner. Thereupon said bank shall be entitled to a certificate reciting that it is "guaranteed" as in said act provided.

By section 3 of said act it is further provided that the Bank Commissioner, during the month of January in each year, shall make assessments of one-twentieth of one per cent, on the average guaranteed deposits less capital and surplus of each bank, until the cash fund accumulated shall approximate \$500,000 over and above the cash deposited in lieu of bonds. Should said fund become depleted the Bank Commissioners may make additional assessments, provided not more than five of such assessments of one-twentieth of one per cent, shall be made in any one calendar year, the said fund to be held by the state treasurer as by law provided, subject to the order of the Bank Commissioner.

By Section 4 of said act it is further provided that when any bank shall become insolvent the commissioner shall take charge of such bank and proceed to wind up its affairs, and at the earliest moment issue to each depositor a "certificate upon proof of claim bearing six per cent. interest per annum upon which dividends shall be entered when paid, except where a contract rate exists on the deposits, in which case the certificate shall bear interest at its contract rate." \* \* \*

"After the officer in charge of the bank shall have realized upon the assets of said bank and exhausted the double liability of its stockholders, and shall have paid all funds so collected in dividends to the depositors, he shall certify all balances due on guaranteed deposits (if any exist) to the Bank Commissioner, who shall then, upon his approval of such certification, draw checks upon the state treasurer, to be countersigned by the Auditor of State, payable out of the bank depositors' guaranty fund in favor of each depositor for the balance due upon such proof of claim as hereinafter provided."

That under and by virtue of the provisions supra, the private depositors whose claims are guaranteed under said act are given a preferential claim over all other creditors of such insolvent bank in

that all of the assets of the said Bank (including the liability  
12 of stockholders) shall be applied, first, in payment of the claims of private depositors whose claims are guaranteed to the exclusion of any dividend upon the claims of other creditors; and furthermore such private depositors who are guaranteed under the provisions of this act, are entitled to have and receive the par

value of their said claims, plus interest thereon at the rate of six per cent, all to the exclusion of and in discrimination against all other creditors of such insolvent bank, and by reason whereof the said provisions in the said act impair the obligations existing between said bank and its other creditors whose claims are not so guaranteed, in violation of Section 10 of Article 1, of the Constitution of the United States, which prohibits any state from passing any "law impairing the obligations of contracts"; and in violation of the provision in Section 1 of Fourteenth Amendment of Constitution of United States which provides that no state shall "deny to any person within its jurisdiction the equal protection of the law."

That complainants, by reason of their business throughout the different parts of the State of Kansas, are necessarily required to and do have and make deposits with state banks in the state of Kansas, some of which have already gone into the guaranty system and in other banks, which, if the law be enforced, will be required to go into the said guaranty system, and that by reason of the premises if any of the said banks shall become insolvent, and their affairs wound up by the Bank Commissioner under said act, these complainants so having deposits in the said banks will be deprived of their lawful and constitutional right to share pro rata with other creditors in the assets of the said banks, and that their contracts with the said depositing banks will be impaired, in violation of the provision of Section 10 Article 1 of Constitution of the United States, and in violation of Section 1 Fourteenth Amendment of Constitution of the United States severally quoted supra.

## VII.

That it is provided in Section 6 of the said Bank Guaranty Act of March 6, 1909, that the only claims which shall have the benefit of the said guaranty provisions are as follows: (a) Deposits which do not bear interest; (b) Time certificates not payable in less  
 13      than six months from date, and not exceeding more than one year, bearing interest not exceeding three per cent, and on which interest shall cease at maturity; (c) Savings accounts not exceeding in amount \$100 to any one person and not subject to check, and upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal and bearing interest not to exceed three per cent.

General deposits of private depositors for which the bank agrees to pay interest do not share in the guaranty provision; time certificates payable in less than six months do not share in the guaranty provision; certificates running for more than one year do not share in the guaranty provision; time certificates bearing interest at more than three per cent. per annum do not share in the guaranty provision; savings accounts in the amount of more than \$100 to one person do not share in the guaranty provision; savings deposits, even though less than \$100 to any one person, if the bank has not reserved in writing the right to require sixty days' notice of withdrawal, do not share in the guaranty provision; savings accounts which draw interest at a rate exceeding three per cent per annum

do not share in the guaranty provision, but all such deposits are discriminated against, and which said discrimination is arbitrary and without reason and is not based upon any classification which can be justified in either law or morals.

By said Section 6 deposits which are rediscounts and deposits which consist of money borrowed from other banks, and all deposits otherwise secured, shall not be guaranteed under said act, and none of which claims are entitled to share in the said guaranty fund, but to the contrary all of the creditors which fall within any of the excluded classes above enumerated are not entitled to share in any of the assets of an insolvent bank, nor in the stockholders' liability until after all of the guaranteed depositors' claims are first paid in full out of said assets and said stockholders' liability, and should the payment of such guaranteed claims exceed the entire assets of the bank and stockholders' liability, the other creditors above enumerated including complainants will receive no share whatsoever in the said assets of said insolvent bank, but are unlawfully discriminated against, and by reason of the premises said law is unconstitutional and void in that it impairs the contract obligations

14 between said depositors including complainants and the said insolvent bank, in violation of Section 10 Article 1 of the Constitution of the United States, above quoted, and deprives all of said creditors including complainants of property without due process of law, and denies to them the equal protection of the laws in violation of Section 1 of Fourteenth Amendment of Constitution of the United States.

In this connection complainants further aver that in the transaction of banking business it is necessary for banks to have, and they do have and complainants have moneys on deposit with banks which have already gone into the bank guaranty system, and with banks which have made application and intend to go into the bank guaranty system, and other banks which the defendants mean and intend to require and compel to go into the bank guaranty system; and it is necessary in the banking business in the state of Kansas for banks to borrow money temporarily from other banks, and to rediscount paper in other banks, including banks which have gone into the guaranty system, and banks which have made application and intend to go into the bank guaranty system, and in banks which the defendants intend to compel to go into the bank guaranty system, and all of which claims, credits loans and discounts, in law and morals, are entitled to be protected equally with other claims against any insolvent bank, and that by reason of the premises Section 6 of the said bank guaranty law creates an unlawful and unreasonable discrimination as between claims, creditors and banks, including complainants and deprives and impairs the obligations existing between them including complainants and such insolvent bank or banks in violation of Section 10 of Article 1 of the Constitution of the United States and denies to them the equal protection of the laws and deprives them including complainants of property without due process of law, in violation of Section 1 Fourteenth Amend-

ment of Constitution of United States, and by reason whereof said guaranty banking act is unconstitutional and void.

### VIII.

It is provided in Section 7 of said bank guaranty law of March 6th, 1909, that "No bank which pays interest at a rate greater than three per cent. per annum on any form of deposit, or pays any interest on savings deposits withdrawn before July 1st or January 1st next following the date of the deposit, or on any time certificate before maturity shall be permitted to participate in the benefits of this act;" and which said provision is intended and will operate to deprive all of the supposed guaranteed depositors in any insolvent bank of the right or privilege to receive any benefit out of the said guaranty fund providing the bank in which there are such depositors shall at any time violate any of the provisions in the said paragraph of Section 7 above quoted. That said provision in said Section 7 of the said act gives to the defendant, Joseph N. Dolley, Bank Commissioner of the State of Kansas, arbitrary power and authority to deprive any bank of the benefits of said law, and of the guaranty provisions therein provided, and to deprive the guaranteed depositors in any such bank of the rights and privileges intended to be secured to them under said law, if such bank, after having accepted of the provisions of the law shall pay interest at a greater rate than three per cent. per annum upon any deposit, or shall pay interest on any savings deposit withdrawn before July 1st or January 1st next following, the date of the deposit, or shall pay interest on any time certificate which may be cashed before maturity, and that each and all of said provisions are unreasonable, unjust and arbitrary, and are not based upon any reasonable classification, and the provisions of said Section 7 of said act in their operation and effect destroy the obligations of the contract created between such banks as accept the provisions of the law, and the state of Kansas, and the contracts between such banks and their guaranteed depositors in violation of Section 10 of Article 1 of Constitution of the United States, which forbids any state passing a "law" impairing obligations of contracts and operates to deprive such banks and their depositors including complainants of property without due process of law, and denies to them the equal protection of the laws, in violation of Section 1 of Fourteenth Amendment of Constitution of the United States, and by reason of the premises said law is unconstitutional and void.

### IX.

That the amount of the deposits required to be made with the state treasurer of the state of Kansas of either bonds or money, as provided in Section 2 of the said bank guaranty act, and of the guaranty assessments provided for and authorized to be made under section 2 and Section 3 of said Bank Guaranty act will as to each of the complainant banks in case they be held to be entitled to participate in said fund in law, exceed the sum or value of \$2,000 exclusive of interest and costs.

That under said guaranty law the depositors in banks which have



not become guaranteed banks are not guaranteed while depositors in banks which have become guaranteed suppose themselves to be guaranteed and are led to believe by the state of Kansas and by said defendant Joseph N. Dolley as Bank Commissioner of the State of Kansas, that they are guaranteed and all banks which have become guaranteed banks are advertised by the state of Kansas and by the Bank Commissioner thereof as guaranteed banks; and the result of the enforcement of said law will be to either drive unguaranteed banks out of business and force them to liquidate and wind up their business, or to force banks which have not become guaranteed to make assessments on their stockholders for the purpose of raising a surplus fund, equal to 10% of their capital in case they have no such surplus fund and to cease to pay more than 3% interest on deposits of any kind and to relinquish many other valuable rights guaranteed to them by the constitution and laws of the state of Kansas and of the United States.

That of your orators the following have not a surplus fund equal to 10% of their capital stock, to-wit:

First National Bank of Bellaire, Union State Bank of Downs, Ford State Bank of Ford, Bank of Hamlin, Farmers & Merchants State Bank of Harper, State Bank of Home City, Iuka State Bank, Exchange Bank of Lenora, Peru State Bank, Peoples Bank of Pratt, South Haven Bank, Farmers State Bank of Whiting and Willis State Bank.

That said banks are authorized by all of the laws of the State of Kansas and of the United States to do a banking business without such 10% surplus and cannot legally compel their stockholders to submit to an assessment sufficient to create such a surplus. And said banks may not therefore share in the benefits of said law if any there be.

That the right of your orators and each of them to transact the banking business is of the value of more than \$2,000 exclusive of interest and costs and the value of the rights which your orators would be compelled to surrender in order to become guaranteed banks under said law and in order to prevent the destruction of their business as above set forth is more than \$2,000 exclusive of interest and costs.

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## X.

That the purpose, object and intent of the said Bank Guaranty Law is to take the property of each and all of the banks that accept of the provisions of said act, and to compel each and all of the banks which accept of the provisions of said act to set apart and deposit with and pay over to the Treasurer of the State of Kansas bonds, money and assessments, as in sections 2 and 3 of said act provided, and that the said bonds, money, and assessments shall be appropriated by said Joseph N. Dolley, Bank Commissioner, under the provisions of said act, in payment of the private claims of the class described as guaranteed deposits in some other bank which may become insolvent, and which appropriation and payment is a gratuity to such private claimants, as such depositors, and to

whom the contributing banks are under no obligation, contractual or otherwise, and which is a taking of the money and property of the contributing banks including complainants without due process of law, and is a denial to each of them of the equal protection of the law, in violation of section 1 of Fourteenth Amendment of Constitution of United States, and by reason whereof said Bank Guaranty Law is unconstitutional and void.

That when the stockholders in said complainant banks became the owners of the stock in said banks now owned by them, said banks had no power or right to embark their funds in any scheme for the guaranty of the payment of deposits in other banks and had no power or authority to risk their funds by entering into any such guaranty scheme, and that the right of said stockholders in said banks to have said banks continue in the banking business alone and to refrain from risking their funds in the insurance business was and is a valuable contract and property right, and that the said law purporting to authorize the investment of the funds of said banks in said guaranty scheme and the investment of said funds in said scheme impairs the contract rights of said stockholders and deprives said stockholders of property without due process of law, in that it lessens and diminishes the assets of said banks which give value to said stock, and takes the property of said stockholders to pay debts for which they are in no way liable without any benefit to them, and without relieving them in any way from their liability as stockholders.

That said Bank Guaranty Act in and of itself is unconstitutional and void, in that it creates unlawful and unreasonable discrimination in various and many particulars between state banks which may accept the provisions of said act and state banks which may not accept the provisions of said act, and arbitrarily classes said banks without reason in this: That state banks which pay more than three per cent interest per annum on deposits of any kind may not accept the provisions of said act, while state banks which do not pay more than three per cent interest per annum on deposits of any kind may accept the provisions of said act; and that state banks which have not a paid-up surplus equal to ten per cent of their capital stock may not accept the provisions of said act, while state banks which have such paid-up surplus may accept the provisions of said act; and that banks which have not been doing business for more than one year may not accept the provisions of said act, while state banks which have been doing business for more than one year may accept the provisions of said act, with the further arbitrary and unreasonable classification in this connection that state banks which have not been doing business for more than one year, but which are situated in cities in which all banks shall have neglected or failed to become guaranteed banks under the provisions of said act for a period of six months after the taking effect of this act, may accept the provisions of this act. That such classification of state banks is arbitrary and unreasonable and deprives

state banks which are not permitted to accept the provisions of said act of property without due process of law and of the equal protection of the laws, in violation of the provisions of section 1 of the Fourteenth Amendment to the constitution of the United States.

## XII.

19 That said Bank Guaranty Act in and of itself is unconstitutional and void, in that it creates an unlawful and unreasonable discrimination in various and many particulars between banks which may and do accept its provisions, in this: That under said law banks which have equal deposits subject to guaranty but unequal capital and surplus are not subject to the same amount of assessment to protect the same amount of deposits, but that banks having the largest capital and surplus are required by said law to pay the smallest amount of assessment; and in this, that the minimum amount of bonds which may be deposited by any bank is \$500 and that the minimum assessment that may be paid by any bank is twenty dollars and that banks having small amounts of deposits are required thereby to pay assessments on such amounts at a higher rate per cent than other banks. That such classification of said banks is unreasonable and arbitrary and denies certain of said banks of equal protection of the laws as above set forth, and deprives them of property without due process of law as above set forth—all contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

## XIII.

That said Bank Guaranty Act in and of itself is unconstitutional and void, in that it creates an unlawful and unreasonable discrimination in various and many particulars between the depositors of banks and those wishing to do business with banks, in this: That depositors whose deposits bear interest are not permitted to receive the benefits of said act, while depositors whose deposits do not bear interest are permitted to receive the benefits of said act; and that depositors whose deposits are represented by certificates not payable in less than six months and not extending for more than one year, bearing interest at not to exceed three per cent per annum and on which interest shall cease at maturity are entitled to the benefits of said act, while depositors whose deposits are represented by certificates for different terms or which bear interest at a greater rate than three per cent per annum are not entitled to the benefits of said act; and that depositors having savings accounts not exceeding in amount one hundred dollars and not subject to check, and upon which the bank has reserved in writing the right to require  
 20 sixty days' notice of withdrawal, and bearing interest at not to exceed three per cent, are entitled to the benefits of said act, while depositors having savings accounts exceeding one hundred dollars in amount or which are subject to check or upon which the bank has nor reserved in writing the right to require sixty days' notice of withdrawal, or which bear interest at a greater rate than three per cent per annum, are not entitled to the benefits of said

act; and in this: That in case of insolvency depositors whose deposits by the terms of the contract of deposit do not bear interest are entitled to certificates upon proof of their claim, which certificates and the claim represented thereby shall bear interest at the rate of six per cent per annum, while depositors whose deposits by the contract of deposit bear interest at the rate of three per cent per annum or less are entitled in case of insolvency of the bank to certificate which bear interest only at said contract rate of three per cent per annum or less. That such classification is arbitrary and unreasonable, and deprives certain of said depositors as above set forth of the equal protection of the laws and deprives them of property without due process of law, contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

#### XIV.

That the effect of said bank guaranty act is to embark the State in the private business or pursuit of carrying on a mutual insurance company.

That said act requires the State Printer, at the expense of the state, to print and furnish forms and records to be used in carrying out said law, and requires the Bank Commissioner and his clerks and assistants and the State Treasurer and his clerks and assistants to employ the time for which they are paid by the State in carrying out the said law.

That there are more than 700 banks in the State of Kansas which are entitled to become guaranteed banks under said law, and that the carrying on of said mutual insurance scheme will be a great expense to the State which can be paid only by money raised by taxation.

21 That the State of Kansas and the Legislature thereof have no power to embark in the private business of insurance or to expend money of the State raised by taxation in carrying on mutual insurance companies and that all money used in the carrying out of said scheme will be taken from the taxpayers of the State of Kansas without due process of law, and the effect of said act will be to deprive the taxpayers of Kansas of property without due process of law.

That your orators, and their respective share-holders are tax payers & have paid large sums of money into the general revenue fund of the state on account of levies and assessments made against the real estate owned by your orators, and on account of their capital stock, and will be required to continue to make such payments, and that such funds have been and are being paid out by the defendants, and, unless enjoined, will continue to be paid out in connection with the operation and enforcement of said chapter 61, Laws of 1909. That the amount of taxation by reason of this law will not exceed \$2000 as to any one bank complaining herein.

That said Bank Guaranty Law in its force and effect, and in its practical application, is intended to be and is unjustly and unlawfully discriminatory in favor of and in behalf of the banks which

shall accept of its provisions, and against all banks, State or National which shall not accept of its provisions.

That said law is in its very essence, fraudulent and promotive of fraud and deception. In its practical workings it gives depositors a false assurance, and persuades and tends to persuade them that they are guaranteed and secured when they are in fact not guaranteed or secured. It requires of the Bank Commissioner a certificate which is false and misleading, and which in its practical working, and especially because it emanates from the sovereign State tends to mislead and deceive the public as to the degree of security offered. It encourages, makes easy, and directly causes, false representations by so-called guaranteed banks, which banks are securing deposits by false signs and advertisements tending to persuade the public that their depositors are guaranteed by the State of Kansas and by an adequate special fund provided by the State of Kansas. Said act thus gives banks which accept its provisions, the right and power, under the guise and sanction of law, to obtain deposits by false and fraudulent representations; and by virtue of said law said banks are, as a matter of fact, so obtaining deposits to the great injury of banks honestly and fairly conducted.

That said law in its practical operation and effect (under and by virtue of the certificate which under the said act is to be issued by the Bank Commissioner to the banks which accept of the said guaranty provision) is intended to and will enable, authorize and empower the banks which accept the guaranty provisions to hold out to depositors and to the public that the depositors therein  
 22 are guaranteed, and that depositors in other banks are not so guaranteed, and all other banks are prohibited by the said law from giving out or advertising that their deposits are guaranteed, whereby and by reason whereof banks of small capitalization and otherwise insecure may induce and persuade citizens of the State of Kansas, and others, to deposit their money in said guaranteed banks in preference to making such deposits in banks not so guaranteed, and therein and thereby to wrongfully discriminate against and to deplete and diminish the deposits in banks not under the guaranteed system and to the advantage of the banks which are in the guaranteed system, and as against all banks which cannot, under the terms of the act, go into the said guaranty system, and including National banks, and as against trust companies which cannot go into the system; and by reason of the premises the said act is unconstitutional and void, in that it constitutes an unlawful and unreasonable discrimination in favor of certain banks as hereinbefore described, and as against other banks and trust companies as hereinbefore described, and is unconstitutional and void, being in violation of the provisions of section 1 of Fourteenth Amendment of Constitution of the United States hereinbefore more specifically pleaded.

The said Bank Guaranty Act in and of itself is unconstitutional and void, in that it creates an unlawful and unreasonable discrimination in various and many particulars between the banks which may accept of the provisions of said act and of the banks which do not or cannot accept of the provisions of said act, which discrimination

consists, among other things: (a) in the fact that the depositors in one class of banks have the privileges of the guaranty provision, while the depositors in other banks do not have such privileges; (b) that under said act certain banks of the State are prohibited from accepting of the provisions of the said act, while other banks, by reason of the manner of conducting their business, or in the judgment of the Bank Commissioner, may accept of the provisions of the said Bank Guaranty Act; (c) that as to the guaranteed banks their guaranteed depositors have a preferential claim over all other creditors, even to the absorption of all of the assets of the bank to the exclusion of other creditors, while as to banks not entering into the guaranty system all creditors share pro rata in the division of the assets of the bank in case of insolvency; (d) that as to national banks the national banking act of the United States provides that all creditors of the bank shall share pro rata in the assets of the bank and the payment of the assets to depositors in preference to all other creditors is by the terms of the National Banking Act prohibited, and that the basis and purpose of the said Bank Guaranty Act is to create a preferential class of banks out of, from and among the banks of the state of Kansas, as appears in many particulars and provisions of the said act too numerous to herein recite or specifically mention, and as will more particularly appear in the said act; and that by reason whereof the said act is unconstitutional and void in that it deprives banks which do not, and banks which cannot, and trust companies which cannot accept of the provisions of the said act of the equal protection of the laws, in violation of the provisions to that effect, in Section 1 of Fourteenth Amendment of Constitution of United States.

## XV.

That by Section 16 of the said Bank guaranty act it is provided "All acts and parts of acts in conflict with this act are hereby repealed in so far as they so conflict, but no provision of any banking law or other statute of this state shall be construed to be amended, modified or repealed, except in so far as necessary to permit the unrestricted operation of this act as applied to banks participating in the privileges of this act."

That no where in the said act is there any other provision relating to the amendment or repeal of any section or any part of the existing banking laws of the state of Kansas, and there is no way of determining what section or part of any section of the existing banking laws of the State of Kansas are thereby intended to be repealed or amended, nor what repeal or amendment of any section or part of the existing banking law shall be construed or determined to interfere with the unrestricted operation of said act, nor in how far any provision of the existing banking law shall be determined to be in conflict with the provision of said bank guaranty act, nor what section or part of any section or sections of the existing banking laws of the state of Kansas are in fact repealed or intended to be repealed, and that by reason whereof the



24 said bank guaranty law, in its entirety, is unconstitutional and void, in that it is indefinite and uncertain as to sections repealed or amended, and is in conflict with various provisions of sections of the existing banking laws of the State of Kansas, and is in conflict with section 16 of Article 2 of the Constitution of the state of Kansas, and is unconstitutional and void in that it is in violation of the provisions of section 17 of Article 2 of the Constitution of the state of Kansas.

That in support of the averments in the different paragraphs of this bill contained, the said bank guaranty act is made part hereof and attached hereto as exhibit "A."

## XVI.

Complainants further aver that all the sections of the said bank guaranty act hereinbefore referred to and complained of as being in violation of the provisions of the Constitution of the United States and of the provisions of the Constitution of the state of Kansas hereinbefore specifically mentioned, and section 13 which provides for the admission of national banks thereof are material and essential parts of the said act, and without which the said act would not have been passed by the legislature nor approved by the Governor of said state, and that by reasons of the premises the entire act is null and void, and in violation of the provisions of the Constitution of United States hereinbefore referred to, and is in violation of the provisions of the Constitution of the state of Kansas, hereinbefore referred to.

## XVII.

25 Complainants further aver that the said defendants, Joseph N. Dolley, Bank Commissioner, and Mark Tulley, State Treasurer, are meaning and intending to enforce each and singular of the obligations and provisions of the said law and have already admitted a considerable number of state banks of the state of Kansas to the privileges granted under said law, and to that end have issued to certain banks certificates to that effect, and that the applications of other State banks are now pending before the Bank Commissioner for examination, and that the said Bank Commissioner threatens, means and intends to accept and receive the said application- and to issue to the said banks so applying certificates, as provided for in section 2 of said act, unless restrained and enjoined by the order of this court, all of which is and will be to the irreparable damage of the complainants herein, as hereinbefore more specifically appears, and that complainants are without adequate remedy at law in the premises.

Wherefore complainants pray your Honors for the granting of a temporary injunction enjoining and restraining the defendants, Joseph N. Dolley, Bank Commissioner of the state of Kansas, and Mark Tully, state treasurer of the state of Kansas, from proceeding to act under or enforce the said law of the legislature of the state of Kansas, approved March 6th, 1909, and that they be enjoined and restrained from receiving deposits of bonds or money, as in section

2 provided for, and from issuing certificates to any bank or banks, and from levying or causing to be levied any assessment under said act against any bank or banks, as in section 2 provided for, and that they be further enjoined and restrained from enforcing any of the provisions of the said act, and from attempting to exercise any powers or rights under the said act, and restrained and enjoined from interfering with the complainants by reason of their failure to make application to participate in the provisions of the said banking act.

And further pray, that upon the final hearing herein it shall be adjudged, decreed and determined that the said banking act, passed March 6th, 1909 of the state of Kansas be and is unconstitutional, null and void, as being in violation of the provisions of the Constitution of the United States and of the Constitution of the state of Kansas, for the reasons in that behalf in the bill of complaint set forth, and that such injunction be thereupon made perpetual, and for such other and further relief as the complainants may in equity and good conscience be entitled to in the premises.

26 May it please your Honors to grant unto these complainants a writ of subpoena of the United States of America, directed to Joseph N. Dolley, Bank Commissioner of the State of Kansas, and Mark Tulley State Treasurer of the State of Kansas, commanding them that on a certain day, and under a certain penalty therein to be specified, personally to be and appear in this Honorable court then and there to make full, true and complete answer to all and singular the averments, but not under oath or affirmation (an answer under oath or affirmation being hereby expressly waived), and to stand to and abide by such order and decree herein as this Honorable court shall deem meet and agreeable to equity and good conscience.

CHESTER I. LONG,  
JOHN L. HUNT,  
J. W. GLEED,  
*Solicitors for Complainant.*

B. P. WAGGENER,  
JOHN L. WEBSTER,  
*Of Counsel.*

STATE OF KANSAS,  
*Shawnee County, ss:*

J. W. Gleed, being first duly sworn on oath deposes and says: That he is one of the solicitors for said complainants and this affiant says that he has read the foregoing bill of complaint, knows the contents thereof, and that the allegations therein are true in fact, except as to such matters as are therein alleged to be stated upon information and belief, or by way of intendment, and as to such matters he believes the same to be true.

J. W. GLEED.

Subscribed and sworn to before me, a Notary Public in and for the county of Shawnee state of Kansas, this 13th day of September, 1909.

[SEAL.]

L. D. STRICKLER,

*Notary Public in and for the County of Shawnee,*

*State of Kansas.*

Com. Expires Sept. 26, 1911.

27

EXHIBIT A.

*Bank Depositors' Guaranty Law.*

[Senate Bill No. 549, Session of 1909.]

An Act providing for the security of depositors in the incorporated banks of Kansas, creating the bank depositors' guarantee fund of the State of Kansas, and providing regulations therefor, and penalties for the violation thereof.

*Be it enacted by the Legislature of the State of Kansas:*

SECTION 1. Any incorporated state bank doing business in this State under the general banking laws of Kansas, having a paid-up and unimpaired surplus fund equal to ten per cent of its capital, and any bank which may after the passage of this act be authorized to do business in this State, and which shall have been actively engaged in the business of banking for at least one year, and having such surplus fund, is hereby authorized and empowered to participate in the assessments and benefits and to be governed by the regulations of the bank depositors' guaranty fund of the State of Kansas hereinafter provided for: *Provided*, That the limitation of one year shall not prevent such participation by a new bank at any time in any city or town in which all banks shall have neglected or failed to become guaranteed banks under the provisions of this act for a period of six months after the taking effect of this act. Before any bank shall become a guaranteed bank within the meaning of this act a resolution of its board of directors, authorized by its stockholders, duly certified by its president and secretary, asking therefor, in form to be provided by the Bank Commissioner, shall be filed with said Bank Commissioner, who shall, upon the filing of such resolution, make a rigid examination of the affairs of such bank, and if it is found to be solvent, to be properly managed and conducting its business in strict accordance with the banking law, he shall, after the bank shall have deposited with the State Treasurer bonds or money as hereinafter provided, issue to such bank a certificate stating in substance that said bank has complied with the provisions of this act, and that its depositors are guaranteed by the bank depositors' guaranty fund of the State of Kansas, as herein provided.

SEC. 2. Before receiving such certificate from the Bank Commissioner each bank entitled to the same according to section 1 of this act shall, as an evidence of good faith, deposit, and shall at all times

maintain with the State Treasurer (subject to the order of the Bank Commissioner when countersigned by the Auditor of State) United States bonds, Kansas State bonds, or the bonds of any county, township, school district, board of education or city within the State of Kansas, to the amount of five hundred dollars for every one hundred thousand dollars or fraction thereof of its average deposits eligible to guaranty (less its capital and surplus) as shown by its last four published statements: *Provided*, That each bank shall so deposit not less than five hundred dollars, and the State Treasurer shall issue his receipt therefor in triplicate, one to the bank, one to the Auditor of State, and one to the Bank Commissioner. Such bonds only shall be accepted as the School Fund Commissioners of the State of Kansas are permitted to buy, and shall bear the certificate of the Attorney-General of the State of

28 Kansas stating that in his opinion said bonds have been legally issued. Said bonds, or cash in lieu thereof, shall not be charged out of the assets of the bank, except as herein-after provided, but shall be carried in its assets under a heading, "Guaranty Fund with State Treasurer," until such time as said bank shall default in payment of assessments hereinafter provided for. In lieu of bonds the bank, at its option, may deposit money, which deposit shall be exchangeable for acceptable bonds when the bank elects to make the substitution. In addition to above each bank shall pay in cash an amount equal to one-twentieth of one per cent of its average deposits eligible to guaranty, less its capital and surplus, and the same shall be credited to the bank depositors' guaranty fund with the State Treasurer, subject to the order of the Bank Commissioner, and the State Treasurer shall issue his receipt therefor in triplicate, one to the bank, one to the Auditor of State, and one to the Bank Commissioner: *Provided*, That the minimum assessment to be required from any bank shall be twenty dollars: *Provided further*, That any bank seeking to participate in the assessments and benefits of this act after the first annual assessment for the year 1910 shall have been made, shall be assessed an amount approximately equal to its proportionate share of the money then in the bank depositors' guaranty fund after all losses shall have been deducted, the amount of such assessment to be determined by the Bank Commissioner. The last above mentioned assessment, however, shall not be required of new banks formed by the reorganization or consolidation of banks which have previously complied with the terms of this act. Upon the deposit and acceptance of such bonds (or money) and the payment of said assessment, then the payment of such deposits of said bank as are specified in this act shall be guaranteed as herein provided, and the bank entitled to its certificate.

SEC. 3. The Bank Commissioner shall, during the month of January of each year, make assessment of one-twentieth of one per cent of the average guaranteed deposits, less capital and surplus, of each bank (the minimum assessment in any case to be twenty dollars), until the cash fund accumulated and placed to the credit of the bank depositors' guaranty fund shall be approximately five

hundred thousand dollars over and above the cash deposited in lieu of bonds, when he shall discontinue such assessments. Should such fund become depleted the Bank Commissioner shall make such additional assessments from time to time as may become necessary to maintain the same: *Provided*, That not more than five such assessments of one-twentieth of one per cent each shall be made in any one calendar year. The Treasurer of the State of Kansas shall hold this fund in the State Depository banks as provided by law governing other State funds, subject to the order of the Bank Commissioner, to be countersigned by the Auditor of State, for the payment of depositors of failed guaranteed banks, as hereinafter provided. The State Treasurer shall credit this fund quarterly with its proportionate share of interest received from State funds, computed at the minimum rate of interest provided by law, upon the average daily balance of said fund.

SEC. 4. When any bank shall be found to be insolvent by the Bank Commissioner he shall take charge of such bank as provided by law, and proceed to wind up its affairs; and shall, at the  
29 earliest moment, issue to each depositor a certificate, upon proof of claim, bearing six per cent interest per annum, upon which dividends shall be entered when paid, except where a contract rate exists on the deposit, in which case the certificate shall bear interest at the contract rate; notice of the amount of each dividend to be paid creditors, and the date when such payment is to be made, shall be published in two consecutive issues of a paper of general circulation in the county or city in which such failed bank is located, and a corresponding notice posted on the door of the receiver's office, and interest shall cease on each dividend on the day named in such notice. The Bank Commissioner shall likewise publish a notice of the date upon which he will make payments of any balance due on such proof of claim, and interest shall cease on the day so advertised, and said proof of claim shall so state. After the officer in charge of the bank shall have realized upon the assets of such bank and exhausted the double liability of its stockholders, and shall have paid all funds so collected in dividends to the depositors, he shall certify all balances due on guaranteed deposits (if any exist) to the Bank Commissioner, who shall then, upon his approval of such certification, draw checks upon the State Treasurer, to be countersigned by the Auditor of State, payable out of the bank depositors' guaranty fund, in favor of each depositor for the balance due on such proof of claim as hereinafter provided. If at any time the available funds in the bank depositors' guaranty fund shall not be sufficient to pay all guaranteed deposits of any failed bank, the five assessments herein provided for having been made, the Bank Commissioner shall pay depositors *pro rata* and the remainder shall be paid when the next assessment is available; *Provided, however*, That whenever the Bank Commissioner shall have paid any dividends to the depositors of any failed bank out of the bank depositors' guaranty fund, then all claims and rights of action of such depositors so paid shall revert to the Bank Commissioner for the benefit of said bank depositors' guaranty fund, until said fund shall have been

fully reimbursed for payments made on account of such failed bank, with interest thereon at three per cent per annum.

SEC. 5. A penalty of fifty per cent of the amount of said assessment shall be added to the assessment of any bank not remitting as aforesaid within thirty days after receipt of notice of such assessment from the Bank Commissioner, and if any bank which shall have been assessed and notified as aforesaid shall fail to remit the amount of said assessment as herein provided, a sufficient amount of its bonds (together with the unexpired coupons) shall be immediately sold by the Bank Commissioner at public sale, and the proceeds used to pay said assessment. Any balance remaining from the proceeds of such sale after the payment of such assessment shall remain to the credit of the bank in the depositors' guaranty fund. The said balance, together with the remainder of the bonds (or cash in lieu thereof) shall be forfeited to the bank depositors' guaranty fund if the bank does not, within sixty days from default in payment of such assessment, remit the full amount of such assessments and penalty to date, and restore the amount of its bonds, or money pledged, as evidence of good faith. Upon the bank's failure to remit

30 its assessments according to the terms of this act the Bank Commissioner shall immediately examine such bank, and if it is found in his judgment to be insolvent he shall take charge of and liquidate said bank according to law. If said bank be found solvent, the Bank Commissioner shall cancel its certificate as a guaranteed bank and cause to be displayed in its banking rooms, in a conspicuous place, continuously for six months, a card not smaller than twenty inches by thirty inches and in large, plain type, reading as follows: "This bank has withdrawn from the bank depositors' guaranty fund, and the guaranty of its deposits will cease on and after ———." The date on this card shall be a date six months after the first posting of such card. Any bank electing to withdraw from the bank depositors' guaranty fund may do so by giving notice to the Bank Commissioner and displaying a card as aforesaid, and at the expiration of the six months as aforesaid may receive its bonds (provided always that said bank shall have paid assessments in full to date) when the affairs of all failed banks in liquidation at the expiration of said six months shall have been closed up and the said bank shall have paid its assessments on account of same.

SEC. 6. Deposits which do not bear interest and the following deposits only shall be guaranteed by this act: Time certificates not payable in less than six months from date and not extending for more than one year, bearing interest at not to exceed three per cent per annum and on which interest shall cease at maturity; savings accounts not exceeding in amount one hundred dollars to any one person and not subject to check, upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal, and bearing interest at not to exceed three per cent per annum. Deposits which are primarily rediscounts or money borrowed by the bank, and all deposits otherwise secured, shall not be guaranteed by this act. Each guaranteed bank shall certify under oath to the Bank Commissioner at the date of each called statement the amount



of money it has on deposit not eligible to guaranty under the provisions of this act, and in assessing such bank this amount shall be deducted from its total deposit. The guaranty as provided for in this act shall not apply to a bank's obligation as indorser upon bills rediscounted, nor to bills payable, nor to money borrowed temporarily from its correspondents or others.

SEC. 7. Each bank guaranteed by this act shall keep a correct record of the rate of interest paid or agreed to be paid to each depositor, and shall make a statement thereof under oath to the Bank Commissioner quarterly. If a bank displays a card or in any manner advertises that its depositors are guaranteed, such bank, if it pays or agrees to pay, either directly or indirectly, interest at any rate greater than three per cent per annum upon deposits of any kind, class or character, shall state upon or in the same card or advertisement that no deposits are guaranteed which bear a greater rate of interest per annum than three per cent; and this portion of the advertisement must be in type of the same size as that used in stating that the deposits of the bank are guaranteed. No bank which pays interest at a rate greater than three per cent per annum on any form of deposit, or pays any interest on savings deposits withdrawn

31 before July 1st or January 1st next following the date of the deposit, or on any time certificate cashed before maturity, shall be permitted to participate in the benefits of this act:

*Provided, however,* That any existing contracts for higher rates of interest entered into before the passage of this act may be carried out unimpaired, and such existing contracts shall not disqualify a bank to participate in the benefits of this act. Any managing officer of any bank guaranteed under this act, or any person acting in its behalf or for its benefit, who shall hereafter pay or promise to pay any depositor, either directly or indirectly, any rate of interest in excess of or in addition to the maximum rate of interest permitted by this act, or who shall, with intent to evade any of the provisions of this act, pledge the time certificate or other obligation of such bank as security for the personal obligation of himself or any other person, shall be guilty of a misdemeanor punishable by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment. The display of any card or other advertisement tending to convey the impression that the deposits of the bank are guaranteed by the State of Kansas, either directly or indirectly, shall be a misdemeanor, and shall subject the offender to a fine of five hundred dollars; and any bank displaying a card or advertisement to the effect that its deposits are guaranteed by the bank depositors' guaranty fund of the State of Kansas, when not authorized so to do under the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than five hundred dollars nor more than one thousand dollars.

SEC. 8. Any trust company heretofore organized under the laws of this State, and now in operation, may reorganize as a State bank under the laws of this State by filing with the Secretary of State an

amended charter signifying such purpose, to be approved by the Charter Board; and any private bank or national bank having the required capital and being otherwise qualified, may reorganize as a State bank; or any newly organized bank taking over the business of another bank, otherwise qualified, may immediately become a guaranteed bank by depositing bonds or money and paying its assessments and otherwise complying with the provisions of this act.

SEC. 9. A solvent bank, upon retiring from business and liquidating its affairs, shall be entitled to receive back from the State Treasurer, after all the depositors in such bank have been paid in full, its bonds or money pledged, but not any part of any unused assessment that may be in the bank depositors' guaranty fund: *Provided, however,* That should such bank be turning over its business to another bank it shall not receive back its bonds or money, deposited in lieu thereof, until the bank receiving its business shall have deposited with the State Treasurer bonds, or money in lieu thereof, according to the requirements of this act.

SEC. 10. Banks may be permitted, in the discretion of the Bank Commissioner, to exchange their bonds for others acceptable under this act, or be allowed to deposit in lieu thereof an equal amount in cash, which may in turn be withdrawn upon the substitution of bonds acceptable under this act.

32 SEC. 11. If at any regular or special examination of a guaranteed bank it shall be found to be violating any of the provisions of this act, the Bank Commissioner shall notify the bank, and the bank may be given thirty days in which to comply with the provisions of this act; and if at the expiration of this time such provisions have not been complied with the Bank Commissioner shall cancel its certificate of membership in the bank depositors' guaranty fund as herein provided, and forfeit its bonds deposited with the State Treasurer for the benefit of the bank depositors' guaranty fund.

SEC. 12. All bonds, and moneys deposited in lieu of bonds, placed in the State Treasury under this act, shall be kept in said treasury separate from all other bonds and moneys and to the credit of the bond account of the Bank depositors' guaranty fund, and shall be used for no other purpose. The State Treasurer shall cause the coupons upon the said bonds to be cut thirty days before maturity and sent or delivered to the bank which deposited them: *Provided, always,* That said bank shall have paid all assessments in full to date.

SEC. 13. After the passage of this act any National bank doing business in the State of Kansas, under the laws of the United States, after an examination at its expense by the State Bank Commissioner, and upon his approval as to its financial condition, may at its option participate in the assessments and benefits of the bank depositors' guaranty fund of the State of Kansas upon the same terms and conditions as apply to State banks: *Provided,* That such National bank shall forward to the Bank Commissioner of the State of Kansas detailed reports, in form to be provided by him, of its condition on the dates of the usual called statements of State banks (such

report not to be published except at the option of the bank), and shall submit to one examination each year by his department (or oftener in his discretion) as provided by the banking laws of the State of Kansas, and pay the usual fee therefor. Should a National bank disregard or refuse to comply with any recommendation made by the Bank Commissioner, in conformity with the provisions of this act, it shall immediately be subject to the provisions and penalties of this act and its certificate of membership in the bank depositors' guaranty fund shall be canceled.

SEC. 14. It shall be unlawful for any bank guaranteed under the provisions of this act to receive deposits continuously for six months in excess of ten times its paid-up capital and surplus, and the violation of this section by any bank shall cancel its rights to participate in the benefits of the bank depositors' guaranty fund, and work a forfeiture of its bonds deposited with the State Treasurer for the benefit of such fund.

SEC. 15. For the purpose of carrying into effect the provisions of this act the Bank Commissioner shall provide forms and make requisition on the State Printer for the necessary blanks, and all reports received by the Bank Commissioner shall be preserved by him in his office. The State Treasurer is authorized to provide forms and make requisition on the State Printer for the necessary blanks and record books for his office.

33 SEC. 16. All acts and parts of acts in conflict with this act are hereby repealed in so far as they so conflict, but no provision of any banking law or other statute of this State shall be construed to be amended, modified or repealed, except in so far as necessary to permit the unrestricted operation of this act as applied to banks participating in the privileges of this act.

SEC. 17. This act shall take effect and be in force from and after June 30, 1909, and its publication in the official State paper.  
Approved March 6, 1909.

Endorsed: No. 8816. In the Circuit Court of United States, Dist. of Kansas, 1st Div. Assaria State Bank et al., Complainants, vs. Joseph N. Dolley as Bank Commissioner et al., Defendants. Bill of Complaint. Filed this 14<sup>th</sup> day of September, 1909. Geo. F. Sharitt, Clerk.

34 *Chancery Subpœna.*

UNITED STATES OF AMERICA,  
*District of Kansas, ss:*

The United States of America to Joseph N. Dolley as Bank Commissioner of the State of Kansas, and Mark Tulley as State Treasurer of the State of Kansas, Greeting:

We command you and every of you, that you appear before our Judge of our Circuit Court of the United States of America for the District of Kansas, First Division, at the City of Topeka, in said District, on the first Monday in the month of November, next,

to answer the Bill of Complaint of Assaria State Bank of Assaria, et al., this day filed in the Clerk's office of said Court in said City of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the District of Kansas to Execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of Topeka, in said District, this 14<sup>th</sup> day of September in the year of our Lord one thousand nine hundred and nine.

[SEAL.]

GEO. F. SHARITT, *Clerk*.

MEMORANDUM.—The above named defendants are notified that unless they enter their appearance in the Clerk's office of said Court, at the City of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

GEO. F. SHARITT, *Clerk*.

35

*U. S. Marshal's Return.*

DISTRICT OF KANSAS, ss:

Received the within writ September the 14<sup>th</sup>, 1909, and executed the same as follows, to wit: Served on the within named Mark Tulley, as State Treasurer of the State of Kansas, personally, by delivering a true and certified copy of this writ, with all endorsements thereon, at Topeka, Kansas on the 14<sup>th</sup> day of September, 1909. Upon the within named Joseph N. Dolley, as Bank Commissioner of the State of Kansas, personally by delivering a true and certified copy of this writ with all endorsements thereon at Topeka, Kansas on the 20<sup>th</sup> day of September, 1909.

Fees: \$4.00.

WILLIAM H. MACKEY, JR.,

*U. S. Marshal,*

By E. M. BIRCH, *Deputy*.

[Endorsed:] No. 8816. Circuit Court United States, District of Kansas. Assaria State Bank of Assaria et al., vs. Joseph N. Dolley as Bank Commissioner, et al. Chancery Subpoena. Returnable to rule day, first Monday in November, A. D. 1909. Geo. F. Sharitt, Clerk. — — —, Deputy Clerk. Filed Sept. 21, A. D. 1909. Geo. F. Sharitt, Clerk. — — —, Deputy Clerk. Chester I. Long, John L. Hunt, J. W. Gleed, B. P. Waggener, John L. Webster, Compl't's Sols.

36 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA (and Forty-six Other State Banks), Complainants,

vs.

J. N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

*Demurrer.*

The demurrer of the above named defendants, J. N. Dolley, Bank Commissioner, and Mark Tulley, as State Treasurer, to the bill of the complainants: The defendants by protestation not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true in such manner and form as the same are therein set forth and alleged, jointly demur to the said bill and for causes of demurrer show:

I.

That the said plaintiffs have not shown by said bill that they or either of them have any right or interest in the subject of the suit, the relief demanded, or the controversy attempted to be alleged which would entitle them or either of them to the relief prayed for therein.

II.

That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit in consequence of the amount involved exceeding the sum of two thousand (2,000) dollars exclusive of interest and costs, and said bill does not affirmatively show that either of said complainants have an interest amounting to the sum of two thousand (2,000) dollars exclusive of interest and costs therein, because said bill affirmatively shows that neither of the said complainants has an interest in the alleged controversy exceeding the said sum of two thousand (2,000) dollars exclusive of interest and costs.

37 That it appeareth by the plaintiffs' own showing in the said bill that they and each of them are not entitled to any relief in the bill against these defendants or any of them alleged and for divers good causes of demurrer which appear on the said bill these defendants do demur to, and they pray judgment of the court whether they or any of them shall be compelled to make any answer to the said bill and they humbly pray to be dismissed with their reasonable costs in their behalf sustained.

F. S. JACKSON, *Att'y Gen'l.*

G. H. BUCKMAN &

A. C. MITCHELL,

*Solicitors of Counsel for Defendants*

*J. N. Dolley and Mark Tulley.*

*Certificate of Counsel.*

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law and it is not interposed for delay, and that the same is true in point of fact.

F. S. JACKSON,  
G. H. BUCKMAN &  
A. C. MITCHELL,  
*Solicitors for Defendants.*

Endorsed: No. 8816. Assaria State Bank et al. vs. J. N. Dolley et al. Demurrer to Bill. Filed Sept. 29, 1909. Geo. F. Sharitt, Clerk.

38 In the United States Circuit Court for the District of Kansas,  
First Division, Sitting at Topeka.

# —.

THE ASSARIA STATE BANK, et al., Complainants.

vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas,  
and Mark Tully, as State Treasurer of the State of Kansas, De-  
fendants.

To Geo. F. Sharitt, Clerk of the United States Circuit Court for the  
District of Kansas:—

Please enter the appearance of Joseph N. Dolley, as Bank Commissioner of the State of Kansas, and of Mark Tully, as State Treasurer of the State of Kansas, and please enter our appearance as solicitors for the said Joseph N. Dolley as Bank Commissioner, and Mark Tully as State Treasurer of the State of Kansas in the above entitled suit.

Dated this 28th day of September, 1909.

GEO. H. BUCKMAN,  
A. C. MITCHELL,  
FRED S. JACKSON,  
*Solicitors and Counsel for Joseph N. Dolley,  
as Bank Commissioner, and Mark Tully  
as State Treasurer of the State of Kansas.*

Endorsed: No. 8816. Assaria State Bank, et al. vs. Joseph N. Dolley et al. Appearance. Filed Sept. 29, 1909. Geo F. Sharitt, Clerk.

39 In the Circuit Court of the United States for the District of  
Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA, et al., Complainants,  
vs.

JOSEPH N. DOLLEY, as Bank Commissioner, et al., Defendants.

*Order.*

Now, on this 29th day of September, 1909, this cause comes on to be heard upon the bill of complaint of the complainants herein as amended, and upon the application of the said complainants for a temporary injunction as prayed for in said bill and upon the demurrer of said defendants to said bill of complaint as amended.

Ordered, that defendants have leave to file their brief herein within ten days from and after this date and that both complainants and defendants have leave to file their additional briefs herein within twenty days from and after this date and that said cause stand as so submitted for final decree herein.

JOHN C. POLLOCK, *Judge.*

GEO. H. BUCKMAN,  
A. C. MITCHELL,  
F. S. JACKSON,

*Solicitors for Def'ts.*

J. W. GLEED,

*Solicitor for Compl't.*

Endorsed: — 8816. Order submitting case. Filed Sept. 29, 1909. Geo. F. Sharitt, clerk.

40 In the Circuit Court of the United States for the District of  
Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA, (and Forty-six Other State  
Banks), Complainants,  
v.

J. N. DOLLEY, as Bank Commissioner of the State of Kansas, and  
Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

*Order.*

Now, on this 18th day of October, 1909, on motion of said complainants it is by the court

Ordered, that said complainants be and they are hereby allowed



until and including the 29th day of October, 1909, in which to file further briefs herein.

JOHN C. POLLOCK, *Judge*.

Endorsed: — 8816. Order extending time for briefs. Filed Oct. 18, 1909. Geo. F. Sharitt, clerk.

41 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8810. Equity.

FRANK S. LARABEE, Complainant,

v.

J. N. DOLLEY, as Bank Commissioner of the State of Kansas, et al.,  
Defendants.

No. 8816. Equity.

ASSARIA STATE BANK OF ASSARIA, Kansas, et al., Complainants,

v.

J. N. DOLLEY, as Bank Commissioner of the State of Kansas, et al.,  
Defendants.

No. 8817. Equity.

ABILENE NATIONAL BANK OF ABILENE, Kansas, et al., Complainants,

v.

J. N. DOLLEY, as Bank Commissioner of the State of Kansas, et al.,  
Defendants.

*Memorandum of Decision on Demurrers to Bills of Complaint.*

Separate bills of complaint have been presented in the above entitled and numbered cases calling in question the constitutional validity of an act of the legislature of this state (Chapter 61, Laws of 1909) commonly known as the Bank Guaranty law of the state. By that act it is provided, as follows:

"An act providing for the security of depositors in the incorporated banks of Kansas, creating the bank depositors guaranty fund of the state of Kansas, and providing regulations therefor, and penalties for the violation thereof.

Be it enacted by the Legislature of the State of Kansas:

"SECTION 1. Any incorporated state bank doing business in this state under the general banking laws of Kansas, having a paid-up and unimpaired surplus fund equal to ten per cent. of its capital, and any bank which may after the passage of this act be authorized to do business in this state, and which shall have been actively engaged in the business of banking, for at least

one year, and having such surplus fund, is hereby authorized and empowered to participate in the assessments and benefits and to be governed by the regulations of the bank depositors' guaranty fund of the state of Kansas hereinafter provided for; provided, that the limitation of one year shall not prevent such participation by a new bank at any time in any city or town in which all banks shall have neglected or failed to become guaranteed banks under the provisions of this act for a period of six months after the taking effect of this act. Before any bank shall become a guaranteed bank within the meaning of this act a resolution of its board of directors, authorized by its stockholders, duly certified by its president and secretary, asking therefor, in form to be provided by the bank commissioners, shall be filed with said bank commissioner, who shall upon the filing of such resolution, make a rigid examination of the affairs of such bank, and if it is found to be solvent, to be properly managed and conducting its business in strict accordance with the banking law, he shall, after the bank shall have deposited with the state treasurer bonds or money as hereinafter provided, issue to such bank a certificate stating in substance that said bank has complied with the provisions of this act, and that its depositors are guaranteed by the bank depositors' guaranty fund of the state of Kansas, as herein provided.

"SEC. 2. Before receiving such certificate from the bank commissioner, each bank entitled to the same according to section 1 of this act, shall as an evidence of good faith, deposit, and shall at all times maintain with the state treasurer (subject to the order of the bank commissioner when countersigned by the auditor of state) United States bonds, Kansas state bonds, or the bonds of any county, township, school district, board of education or city within the state of Kansas, to the amount of five hundred dollars for every one hundred thousand dollars or fraction thereof of its average deposits eligible to guaranty (less its capital and surplus) as shown by its last  
 43 four published statements; provided, that each bank shall so deposit not less than five hundred dollars, and the state treasurer shall issue his receipt therefor in triplicate, one to the bank, one to the auditor of state, and one to the bank commissioner. Such bonds only shall be accepted as the school fund commissioners of the state of Kansas are permitted to buy, and shall bear the certificate of the attorney-general of the state of Kansas stating that in his opinion said bonds have been legally issued. Said bonds, or cash in lieu thereof, shall not be charged out of the assets of the bank, except as hereinafter provided, but shall be carried in its assets under a heading "Guaranty Fund with State Treasurer" until such time as said bank shall default in payment of assessments hereinafter provided for. In lieu of bonds the bank at its option, may deposit money, which deposits shall be exchangeable for acceptable bonds when the bank elects to make the substitution. In addition to above each bank shall pay in cash an amount equal to one-twentieth of one per cent. of its average deposits eligible to guaranty, less its capital and surplus, and the same shall be credited to the bank depositors' guaranty fund with the state treasurer subject to the order of the bank commissioner, and the state treasurer shall issue his re-

ceipt therefor in triplicate, one to the bank, one to the auditor of state, and one to the bank commissioner; provided, that the minimum assessment to be required from any bank shall be twenty dollars; provided further, that any bank seeking to participate in the assessments and benefits of this act after the first annual assessment for the year 1910 shall have been made, shall be assessed an amount approximately equal to its proportionate share of the money then in the bank depositors' guaranty fund after all losses shall have been deducted, the amount of such assessment to be determined by the bank commissioner. The last above mentioned assessment, however, shall not be required of new banks formed by the reorganization or consolidation of banks which have previously complied with the terms of this act. Upon the deposit and acceptance of such bonds (or money) and the payment of said assessment, then the payment of such deposits of said bank as are specified in this act shall be guaranteed as herein provided, and the bank entitled to its certificate.

44 "SEC. 3. The bank commissioner shall, during the month of January of each year, make assessments of one-twentieth of one per cent. of the average guaranteed deposits, less capital and surplus, of each bank (the minimum assessment in any case to be twenty dollars) until the cash fund accumulated and placed to the credit of the bank depositors' guaranty fund shall be approximately five hundred thousand dollars over and above the cash deposited in lieu of bonds, when he shall discontinue such assessments. Should such fund become depleted the bank commissioner shall make such additional assessments from time to time as may become necessary to maintain the same; provided, that not more than five such assessments of one-twentieth of one per cent. each shall be made in any one calendar year. The treasurer of the state of Kansas shall hold this fund in the state depository banks as provided by law governing other state funds, subject to the order of the bank commissioner to be countersigned by the auditor of state, for the payment of depositors of failed guaranteed banks, as hereinafter provided. The state treasurer shall credit this fund quarterly with its proportionate share of interest received from state funds, computed at the minimum rate of interest provided by law, upon the average daily balance of said fund.

"SEC. 4. When any bank shall be found to be insolvent by the bank commissioner he shall take charge of such bank, as provided by law, and proceed to wind up its affairs; and he shall, at the earliest moment, issue to each depositor a certificate, upon proof of claim, bearing six per cent. interest per annum upon which dividends shall be entered when paid, except where a contract rate exists on the deposit, in which case the certificate shall bear interest at the contract rate, notice of the amount of each dividend to be paid creditors and the date when such payment is to be made shall be published in two consecutive issues of a paper of general circulation in the county or city in which such failed bank is located, and a corresponding notice posted on the door of the receiver's office, and interest shall cease on each dividend on the day named in such notice. The bank commissioner shall likewise publish a notice of

the date upon which he will make payments of any balance due on such proof of claim, and interest shall cease on the day so  
45 advertised, and said proof of claim shall so state. After the officer in charge of the bank shall have realized upon the assets of such bank, and exhausted the double liability of its stockholders, and shall have paid all funds so collected in dividends to the depositors, he shall certify all balances due on guaranteed deposits (if any exist) to the bank commissioner who shall then, upon his approval of such certification, draw checks upon the state treasurer, to be countersigned by the auditor of state, payable out of the bank depositors' guaranty fund, in favor of each depositor for the balance due on such proof of claim as hereinafter provided. If at any time the available funds in the bank depositors' guaranty fund shall not be sufficient to pay all guaranteed deposits of any failed bank, the five assessments herein provided for having been made, the bank commissioner shall pay depositors *pro rata* and the remainder shall be paid when the next assessment is available; provided, however, that whenever the bank commissioner shall have paid any dividend to the depositors of any failed bank out of the bank depositors' guaranty fund, then all claims and rights of action of such depositors so paid shall revert to the bank commissioner for the benefit of said bank depositors' guaranty fund, until said fund shall have been fully reimbursed for payments made on account of such failed bank, with interest thereon at three per cent. per annum.

"SEC. 5. A penalty of fifty per cent. of the amount of said assessment shall be added to the assessment of any bank not remitting as aforesaid within thirty days after receipt of notice of such assessment from the bank commissioner, and if any bank which shall have been assessed and notified as aforesaid shall fail to remit the amount of said assessment as herein provided, a sufficient amount of its bonds (together with the unexpired coupons) shall be immediately sold by the bank commissioner at public sale and the proceeds used to pay said assessment. Any balance remaining from the proceeds of such sale after the payment of such assessment shall remain to the credit of the bank in the depositor's guaranty fund. The said balance, together with the remainder of the bonds (or cash in lieu thereof) shall be forfeited to the bank depositors' guaranty fund if the bank does not, within sixty days from default in  
46 payment of such assessment, remit the full amount of such assessments and penalty to date, and restore the amount of its bonds, or money pledged, as evidence of good faith. Upon the bank's failure to remit its assessments according to the terms of this act the bank commissioner shall immediately examine such bank, and if it is found in his judgment to be insolvent he shall take charge of and liquidate said bank according to law. If said bank be found solvent the bank commissioner shall cancel its certificate as a guaranteed bank and cause to be displayed in its banking rooms, in a conspicuous place, continuously for six months, a card not smaller than twenty inches by thirty inches and in large, plain type, reading as follows: "This bank has withdrawn from

the bank depositors' guaranty fund and the guaranty of its deposits will cease on and after ———." The date on this card shall be a date six months after the first posting of such card. Any bank electing to withdraw from the bank depositors' guaranty fund may do so by giving notice to the bank commissioner and displaying a card as aforesaid, and at the expiration of the six months as aforesaid may receive its bonds (provided always that said bank shall have paid assessments in full to date) when the affairs of all failed banks in liquidation at the expiration of said six months shall have been closed up and the said bank shall have paid its assessments on account of same.

"SEC. 6. Deposits which do not bear interest and the following deposits only shall be guaranteed by this act: Time certificates not payable in less than six months from date and not extending for more than one year, bearing interest at not to exceed three per cent. per annum and on which interest shall cease at maturity; saving accounts not exceeding in amount one hundred dollars to any one person and not subject to check, upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal and bearing interest at not to exceed three per cent. per annum. Deposits which are primarily rediscounts or money borrowed by the bank, and all deposits otherwise secured shall not be guaranteed by this act. Each guaranteed bank shall certify under oath to the bank commissioner at the date of each called statement the amount of money it has on deposit not eligible to guaranty under the provisions of this act, and in assessing such bank this amount

47 shall be deducted from its total deposit. The guaranty as provided for in this act shall not apply to a bank's obligation as indorser upon bills rediscounted, nor to bills payable, nor money borrowed temporarily from its correspondents or others.

"SEC. 7. Each bank guaranteed by this act shall keep a correct record of the rate of interest paid or agreed to be paid to each depositor, and shall make a statement thereof under oath to the bank commissioner quarterly. If a bank displays a card or in any manner advertizes that its depositors are guaranteed, such bank, if it pays or agrees to pay, either directly or indirectly, interest at any rate greater than three per cent per annum upon deposits of any kind, class, or character, shall state upon or in the same card or advertisement that no deposits are guaranteed which bear a greater rate of interest per annum than three per cent; and this portion of the advertisement must be in type of the same size as that used in stating that the deposits in the bank are guaranteed. No bank which pays interest at a rate greater than three per cent. per annum on any form of deposit, or pays any interest on savings deposits withdrawn before July 1 or January 1 next following the date of the deposit or on any time certificate cashed before maturity, shall be permitted to participate in the benefits of this act; provided, however, that any existing contracts for higher rates of interest entered into before the passage of this act may be carried out unimpaired, and such existing contracts shall not disqualify a bank to participate in the benefits of this act. Any managing officer of any bank guaranteed under this

act, or any person acting in its behalf or for its benefit, who shall hereafter pay or promise to pay any depositor, either directly or indirectly, any rate of interest in excess of or in addition to the maximum rate of interest permitted by this act, or who shall, with intent to evade any of the provisions of this act, pledge the time certificate or other obligation of such bank as security for the personal obligation of himself or any other person, shall be guilty of a misdemeanor punishable by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment. The display of any card or other advertisement tending to convey the impression that the deposits of the bank are guaranteed by the state of Kansas, either directly or indirectly, shall be a misdemeanor and shall subject the offender to a fine of five hundred dollars and any bank displaying a card or advertisement to the effect that its deposits are guaranteed by the bank depositors' guaranty fund of the state of Kansas when not authorized so to do under the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than five hundred dollars nor more than one thousand dollars.

"SEC. 8. Any trust company heretofore organized under the laws of this state, and now in operation, may reorganize as a state bank under the laws of this state by filing with the secretary of state an amended charter signifying such purpose, to be approved by the Charter Board; and any private bank or national bank having the required capital and being otherwise qualified, may reorganize as a state bank; or any newly organized bank taking over the business of another bank, otherwise qualified, may immediately become a guaranteed bank by depositing bonds or money and paying its assessments and otherwise complying with the provisions of this act.

"SEC. 9. A solvent bank, upon retiring from business and liquidating its affairs, shall be entitled to receive back from the state treasurer, after all the depositors in such bank have been paid in full, its bonds or money pledged, but not any part of any unused assessment that may be in the bank depositors' guaranty fund; provided, however, that should such bank be turning over its business to another bank it shall not receive back its bonds, or money deposited in lieu thereof, until the bank receiving its business shall have deposited with the state treasurer bonds, or money in lieu thereof, according to the requirements of this act.

"SEC. 10. Bank- may be permitted in the discretion of the Bank commissioner, to exchange their bonds for others acceptable under this act, or be allowed to deposit in lieu thereof an equal amount in cash which may in turn be withdrawn upon the substitution of bonds acceptable under this act.

"SEC. 11. If at any regular or special examination of a guaranteed bank it shall be found to be violating any of the provisions of this act the bank commissioner shall notify the bank, and the bank may be given thirty days in which to comply with the provisions of this act; and if at the expiration of this time such provisions have not been complied with the bank commissioner shall

cancel its certificate of membership in the bank depositors' guaranty fund as herein provided and forfeit its bonds deposited with the state treasurer for the benefit of the bank depositors' fund.

"SEC. 12. All bonds, and moneys deposited in lieu of bonds, placed in the state treasury under this act shall be kept in said treasury separate from all other bonds and moneys and to the credit of the bond account of the bank depositors' guaranty fund, and shall be used for no other purpose. The state treasurer shall cause the coupons upon the said bonds to be cut thirty days before maturity and sent or delivered to the bank which deposited them; provided, always, that said bank shall have paid all assessments in full to date.

"SEC. 13. After the passage of this act any national bank doing business in the state of Kansas, under the laws of the United States, after an examination at its expense by the state bank commissioner, and upon his approval as to its financial condition, may at its option participate in the assessments and benefits of the bank depositors' guaranty fund of the state of Kansas upon the same terms and conditions as apply to state banks; provided, that such national bank shall forward to the bank commissioner of the state of Kansas detailed reports, in form to be provided by him, of its condition on the dates of the usual called statements of state banks (such report not to be published except at the option of the bank) and shall submit to one examination each year by his department (or oftener in his discretion) as provided by the banking laws of the state of Kansas, and pay the usual fees therefor. Should a national bank disregard or refuse to comply with any recommendation made by the bank commissioner, in conformity with the provisions of this act, it shall immediately be subject to the provisions and penalties of this act, and its certificate of membership in the bank depositors' guaranty fund shall be canceled.

"SEC. 14. It shall be unlawful for any bank guaranteed under the provisions of this act to receive deposits continuously for six  
50 months in excess of ten times its paid up capital and surplus, and the violation of this section by any bank shall cancel its rights to participate in the benefits of the bank depositors' guaranty fund, and work a forfeiture of its bonds deposited with the state treasurer for the benefit of such fund.

"SEC. 15. For the purpose of carrying into effect the provisions of this act the bank commissioner shall provide forms and make requisition on the state printer for the necessary blanks, and all reports received by the bank commissioner shall be preserved by him in his office. The state treasurer is authorized to provide forms and make requisition on the state printer for the necessary blanks and record-books for his office.

"SEC. 16. All acts and parts of acts in conflict with this act are hereby repealed in so far as they so conflict, but no provision of any banking law or other statute of this state shall be construed to be amended, modified or repealed except in so far as necessary to permit the unrestricted operation of this act as applied to banks participating in the privileges of this act.



"SEC. 17. This act shall take effect and be in force from and after June 30, 1909, and its publication in the official state paper."

To the form and manner of the matters averred in the several bills of complaint so presented, no exceptions have been taken by defendants. On the contrary, general demurrers have been interposed thereto challenging the sufficiency of the averments (1) to confer jurisdiction on this court; (2) to entitle complainants to the relief prayed.

The consideration of the questions presented renders necessary a statement of the facts averred in the several bills of complaint touching the relation of complainants to, and their interest in the subject-matter of the controversy presented. For as complainants and defendants in the several cases are each and all citizens of this state, to confer jurisdiction on this court, the cases must (1) arise under the Constitution and laws of the national government; (2) must involve property rights of sufficient amount to confer jurisdiction on this court, else the demurrers must be sustained.

51 In considering the facts averred in the several bills of complaint for the purpose of testing their legal sufficiency as against the demurrers, it is clear only such matters as may be regarded as well pleaded may be accepted as admitted. *Dillon v. Barnard*, 21 Wall. 430; *United States v. Ames*, 99 U. S. 35; *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U. S. 569; *Chicot v. Sherwood*, 148 U. S. 536; *Equitable Life Assurance Society v. Brown* 213 U. S. 25. In conformity with this rule the relation of complainants to, and their interest in the subject-matter of the controversy presented by the several bills of complaint may be briefly summarized as follows:

Complainant in case No. 8810, Frank S. Larabee, a minority stockholder in the State Exchange Bank of the city of Hutchinson, this state (hereinafter called the "Bank") and the owner of twenty shares therein of the par value of one hundred dollars each, and of the actual value of thirty-five hundred dollars, presents his bill against the bank commissioner and treasurer of the state, whose duties are prescribed in and defined by the terms of the act, also, against the Bank in which he is a shareholder.

It is averred, prior to the institution of this suit over the protest and objection of complainant, a majority of the shareholders in the bank had voted authorizing its board of directors to accept the provisions of the act, and in pursuance of such authority the board of directors had by resolution, duly certified, as provided in Section 1 of the act, declared the intention to accept the terms and conditions of the act. That the capital stock of the Bank is two hundred thousand dollars. That in compliance with the provisions of the act the Bank had deposited with defendant, the treasurer of the state, the sum of one thousand dollars in lieu of that amount of bonds, and had also deposited with the treasurer the further sum of \$84.56, the same being one-twentieth of one per cent. of its average deposits eligible to guaranty, less its capital and surplus. It is further averred the amount which the Bank, by accepting the provisions of the act, will

52 become liable to pay thereunder, is more than two thousand dollars. That unless restrained defendants, as treasurer and bank commissioner of the state, will devote the funds of the Bank pledged and required to be pledged to carrying out the provisions of the act, and will enforce all and singular the provisions and obligations of the act against the bank. That defendant Dole, as bank commissioner, will accept the Bank as eligible to certification under the law, and that the Bank will accept its provisions and obligations as binding on it. That the amount which the Bank has paid, and will be required to pay under the provisions of the act, is more than two thousand dollars. That the act is beyond the constitutional power of the legislature of the state because in violation of the provisions of the national Constitution as more particularly hereinafter stated. Wherefore, a decree is sought declaring the act unconstitutional and void, and enjoining the bank commissioner from issuing his certificate to the Bank that it is guaranteed in pursuance of the law, and the Bank from receiving and accepting the same, and the obligations imposed by the law; restraining defendant treasurer of the state from paying out said moneys deposited with him except by refunding the same to the Bank, and enjoining defendants from in any way carrying into force and effect the provisions of the law.

In Case No. 8816 in which the Assaria State Bank and forty six other state banks are complainants and the treasurer and bank commissioner of the state are defendants, it is averred at and before the passage of the act in question complainants were organized, qualified and doing a banking business under and in pursuance of the laws of the state, in the several different portions of the state where located. That in pursuance of the laws under which they were created and doing business prior to the passage and taking effect of the act in question, their shareholders were liable, in addition to the money represented by their shares, to an amount equal to the par value thereof to the creditors of the bank. That a part only of complainants are qualified to accept the terms of the act. That complainants are tax payers of the state, and a large amount of the funds so collected from complainants by taxation, forming a part of the general revenue fund of the state, is being employed by defendants in carrying into effect the act in question, but that no complainant has been required to, or will pay into such fund to  
53 be so used the sum of two thousand dollars. That it is the object, purpose and intent of defendants, as officers of the state, to require all qualified banks to accept the provisions and obligations of the act. That many banks of the state are accepting its provisions. That more than seven hundred in number are qualified to accept under the provisions of the act. That those of complainants who are not qualified, and all complainants that are qualified but refuse to accept the provisions of the act, will be by the operation of the law, and the business advantages possessed by banks under the law, driven out of business and compelled to suspend operations. That as to each of the complainants the right to continue in business, which will be thus destroyed is of a value in excess of two thousand

dollars. That complainant banks are depositors in other banks of the state in large amounts, that have accepted the provisions of the act, or, being qualified, threaten to accept such provisions, and that the operation of the law discriminates against complainants. That the act in question is violative of the Constitution and laws of the United States, and the provisions of the Constitution of the State as well, in respects hereinafter stated. Wherefore, a decree is prayed declaring the act in question invalid and void and restraining defendants from enforcing its provisions.

In case No. 8817, wherein the Abilene National Bank of Abilene, Kansas, and one hundred and forty nine other national Banks are complainants, and the treasurer and bank commissioner of the state are defendants, it is averred at and before the passage and taking effect of the act in question, complainants, each and all, were organized under authority of national law and were engaged in doing business as national banks and as governmental agencies at different points within the state. While invited by section 13 of the act to accept its provisions, yet by the laws of their creation they are perpetually disqualified from so doing. That by their manner of doing business they are depositors in and creditors of many state banks which are qualified, and have or are threatening to accept the provisions of the act in question. That their shareholders are tax payers of the state, compelled by its laws to contribute to the general revenue fund of the state; That a portion of the funds

54 which the shareholders of complainants have been compelled by taxation to pay is being employed, and will be employed by defendants in carrying into effect the provisions of the act. But that no one of the complainants has or will be compelled by way of taxation to contribute the sum of two thousand dollars which will be employed in this manner by defendants. That complainants were organized by their shareholders and entered upon the conduct of the business and performing the functions of national banks within the state under the assurance from the national government such business would be protected against invasion by laws of the state. That there are more than seven hundred state banks organized and doing a banking business in the state which are qualified to accept the provisions of the act. That it is the object, intent and purpose of defendant officials of the state to require the qualified banks organized under the laws of the state to accept the provisions of the act in question. That many of them have, and others are threatening to so do. That by the natural and necessary operation of said act complainants will be compelled to either surrender their charters and organize as banking corporations under the laws of the state, and accept the provisions of the act, or be driven out of business. In this regard it is specially averred in paragraph IX of the bill, as follows:

"That the depositors in banks which have not accepted the provisions of said law are not guaranteed, while the depositors in banks which have accepted the provisions of said law suppose themselves to be guaranteed, and are led to believe by the State of Kansas and by the defendant J. H. Dolley as Bank Commissioner of the State

of Kansas, and by said guaranteed banks, that they are guaranteed, and the State of Kansas advertises that the depositors in banks which have accepted the provisions in said law are guaranteed; and that in case the law remains in force and effect, banks which may not accept the provisions of said law will be forced to cease doing business for the reason that all, or a large part of their deposits will be withdrawn, and will be forced to wind up their business or to reincorporate in such a way as to entitle them to the benefits of said law, if any such benefits there are. That the right of said complainant banks and the right of each of them to do business  
 55 and exercise the franchise of National banks is of the value of more than \$2,000 exclusive of interest and costs, to each of said banks, and in case said law is enforced your orators and each of them will be compelled either to go out of the banking business or to surrender their charter as National banks and to reincorporate as State banks."

It is further averred in paragraph XIV of the bill, as follows:

"That said Bank Guaranty Law, in its force and effect and its practical application, is intended to be and is unjustly and unlawfully discriminatory in favor of and in behalf of the banks which shall accept of its provisions, and against all banks, State or National, which shall not accept of its provisions."

"That said law is in its very essence, fraudulent, and promotive of fraud and deception. In its practical workings it gives depositors a false assurance, and persuades and tends to persuade them that they are guaranteed and secured when they are in fact not guaranteed or secured. It requires of the Bank Commissioner a certificate which is false and misleading and which in its practical working, and especially because it emanates from the sovereign state, tends to mislead and deceive the public as to the degree of security offered. It encourages, makes easy and directly causes, false representation by so-called guaranteed banks, which banks are securing deposits by false signs and advertisements tending to persuade the public that their depositors are guaranteed by the State of Kansas and by an adequate special fund provided by the State of Kansas. Said act thus gives banks which accept its provisions, the right and power, under the guise and sanction of law, to obtain deposits by false and fraudulent representation; and by virtue of said law said banks are, as a matter of fact, so obtaining deposits to the great injury of banks honestly and fairly conducted.

"That said law in its practical operation and effect (Under and by virtue of the certificate which under the said act is to be issued by the Bank Commissioner to the banks which accept of the said guaranty provision) is intended to and will enable, authorize and empower the banks which accept the guaranty provisions to hold  
 56 out to depositors and to the public that the depositors therein are guaranteed, and that depositors in other banks are not so guaranteed, and all other banks are prohibited by the said law from giving out or advertising that their deposits are guaranteed, whereby and by reason whereof banks of small capitalization and otherwise insecure may induce and persuade citizens of

the State of Kansas, and others to deposit their money in said guaranteed banks in preference to making such deposits in banks not so guaranteed, and therein and thereby to wrongfully discriminate against and to deplete and diminish the deposits in banks not under the guaranteed system and to the advantage of the banks which are in the guaranteed system, and as against all banks which cannot, under the terms of the act, go into the said guaranty system, and including National Banks and as against trust companies which cannot go into the system."

It is further specially averred in paragraph XVII as follows:

"That each and all of the stockholders of complainant banks subscribed to such stock relying upon the guarantee of the Federal Constitution, and that the said banks in which they became stockholders would be permitted to carry on and prosecute their business in the state of Kansas without any interference by partial and discriminating legislation, or legislation which would give to state banks an unequal and undue advantage over National Banks. That said Chapter 61, Laws of 1909 in its effect and operation, gives to state banks an unequal and undue advantage over National Banks and impedes and frustrates them in the prosecution of their business, and impairs their efficiency, and deprives them of their trade, and induces a withdrawal of their deposits, and thereby destroys the value of the stock so held by their shareholders."

The act is further averred to be a violation of the provisions of the National Constitution as hereinafter more particularly stated. Wherefore, it is prayed a decree enter declaring the act unconstitutional and void and restraining defendants from enforcing its provisions as against the rights of complainants.

From this statement of the contents of the several bills of complaint, do complainants, or any of them, show themselves entitled to invoke the jurisdiction of this court for the purpose of  
57 testing the validity of the act in question? That is, do they present a controversy under the Constitution or laws of the general government, the determination of which controversy may be decisive of the case, in which there is involved the amount required to give jurisdiction to this court?

In so far as complainant in Case No. 8810 is concerned, it is quite clear as he is a minority shareholder in a corporation, and brings the suit to prevent the company in which he is interested from the continued misapplication of its corporate funds, the amount involved in the controversy is the value of the right of the Bank sought to be protected by the suit, and not the burden which will be by the law laid on his shares.

In *Davenport v. Dows*, 18 Wall. 626, Mr. Justice Davis, delivering the opinion of the court, said:

"That a stockholder may bring a suit when a corporation refuses is settled in *Dodge v. Woolsey* (18 How. 340) but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert

them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it."

In *Hill v. Glasgow R. Co.*, 41 Fed. 610, which was an action by a minority stockholder to restrain a claimed misapplication of the funds of the company, it is said:

"The position assumed by the demurrants is that the complainant's interest in the litigation or controversy must amount to the value of \$2,000 exclusive of costs and interest, in order to confer jurisdiction upon the court, and that, as it distinctly appears from the bill that such interest of the complainant does not exceed half that amount, the suit cannot be maintained.

58 "This position is not well taken. It overlooks and mistakes the true theory and principle of the bill, which is not the assertion of the complainant's private rights, but rather those of the company in which he had an interest. When suit is necessary to enforce corporate rights to avert wrongs threatening the corporate interests, the general rule is that the suit must be brought by the corporate management in the name of the corporation. Individual shareholders ordinarily are not the proper parties to sue or defend on behalf of corporate interests. It is, however, well settled that if the corporate management refuses or fails to enforce corporate rights, and an irreparable injury to the corporate interests is threatened, a shareholder in a case where the corporation itself would be entitled to an injunction, may bring suit, on behalf of himself and others interested who may join, to enjoin the threatened injury."

In *Texas & P. Ry. Co. v. Kuteman*, 54 Fed. 547, it is said:

"In a suit for an injunction the amount in dispute, is the value of the object to be gained by the bill. *Fost. Fed. Pr. sec. 16*. An injunction may be of much greater value to the complainant than the amount in controversy in cases of dispute which have already arisen. *Symonds v. Greene*, 28 Fed. Rep. 834; *Whitman v. Hubbell*, 30 Fed. Rep. 81. The maintenance of its rates is the real subject of dispute, and the object of the bill and the value of this object must be considered. *Railroad Co. v. Ward* 2 Black, 485. This value not being liquidated or fixed by law, the alleged value, especially on demurrer to the bill, must govern."

In *the City of Hutchinson v. Beckham*, 118 Fed. 399, Judge Thayer for the Circuit Court of Appeals for this Circuit said:

"From the complainants' Standpoint, therefore—and the case must be judged from their standpoint, and not exclusively from the standpoint of the city—the amount involved in the litigation was not merely the license tax of \$500 which accrued on June 1, 1900, but it was the total amount of their loss incident to the causes aforesaid, if the bill was not entertained, and if the city was left free to pursue its own course in enforcing the ordinance. Our attention

59 has been invited to several cases which were brought to enjoin the collection of taxes that were alleged to be illegal, in which it was held that the amount in controversy for jurisdictional purposes was the amount of the tax (*Transfer Co. v. Pendergrass*, 16 C. C. A. 585, 70 Fed. 1; *Walter v. Railroad Co.* 147 U. S. 370, 13 Sup. Ct 348, 37 L. Ed. 206; *Railroad Co. v. Walker* 148 U. S. 391, 13 Sup. Ct 650, 37 L. Ed. 494) but an examination of these cases shows that they are not analogous to the case at bar, in that it did not appear that the complainants would sustain any other direct damage save the amount of the tax, which if paid under protest, they could recover in an action at law, if the tax was found to be illegal. The present case is distinguishable from the cases relied upon by the appellants, in that the tax involved is a license tax imposed by a municipality upon a business concern, the payment of which tax may be enforced by fining and imprisoning its employes and by daily arrests that will seriously interfere with the prosecution of complainant's business, and inflict a much greater direct loss than the amount of the tax."

In *Board of Trade v. Cella Commission Co.*, 145 Fed. 28 Judge Hook delivering the opinion for the circuit court of Appeals for this circuit said:

"In a suit to enjoin a threatened or continued commission of certain acts the amount of value involved is the value of the right which the complainant seeks to protect from invasion, or of the object to be gained by the bill. It is not the sum he might recover in an action at law for the damage already sustained, nor is he required to wait until it reaches the jurisdictional amount."

In *Humes v. City of Ft. Smith*, 93 Fed. 857, it is said:

"The defendant insists that the court is without jurisdiction, because the amount in controversy does not exceed the sum of \$2,000; that is to say, that the amount which the complainant would have to pay for license to conduct his business does not amount to that sum. Jurisdiction is not determined in that way. Jurisdiction is determined by the value of the right to be protected, or the extent of the injury to be prevented, by the injunction. *Railway Co. v. McConnell*, 82 Fed. 65."

In *Scott v. Donald*, 165 U. S. 107, Mr. Justice Shiras, delivering the opinion of the court, after referring to the averments of the bill, said:

60 "Such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceed the value of two thousand dollars. Nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy by injunction would be no avail."

To like effect are the cases of *Bitterman v. Louisville & Nashville R. R.*, 207 U. S. 205; *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322; *Howe v. Howe & Owen Ball Bearing Co.* 154 Fed. 820; *Louisville & N. R. Co. v. Smith*, 128 Fed. 1; *Northern Pac. Ry. Co.*



v. Pacific Coast Lumber Mfrs. Ass'n, 165 Fed. 1; City of Ottumwa v. City of Ottumwa v. City Water Supply Co., 119 Fed. 315.

In *Barry v. Edmunds*, 116 U. S. 550, Mr. Justice Matthews in reviewing an order of the Circuit Court dismissing a bill on the ground here presented, said:

"The order of the Circuit Court dismissing the cause on this ground is reviewable by this court on writ of error by the express words of the act. In making such an order, therefore, the Circuit Court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of the cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however, strong, he would not be at liberty to act, unless the facts on which the persuasion is based when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, 'shall appear to the satisfaction of said Circuit Court.' See, also, *Henry & Sons, & Co. v. Colorado Farm & L. S. Co.*, 164 Fed. 986; *North American Cold Storage Co. v. City of Chicago et al.*, 151 Fed. 120.

As the bill in this case specifically avers the amount the Bank will be compelled to deposit with the treasurer of the state, 61 if it is permitted to comply with the provisions of the act, is more than two thousand dollars, which may be employed by defendants in paying the obligations of other banks to their depositors, and hence not returned to the bank, and as the act contemplate a continued course of business, I am not of the opinion the bill shows on its face a want of jurisdictional amount in controversy, but, on the contrary, the demurrer for want of jurisdiction as to that case must be overruled, if it be found a case arising under the Constitution and laws of the United States.

It is asserted by complainant in his bill the act in question is in violation of the national Constitution because it impairs the obligation of his contract as a shareholder in the Bank by taking its property, of which he in common with the other shareholders are owners subject only to the payment of the outstanding debts of the corporation, and applies it to the payment of private debts, which neither the Bank nor himself have contracted, and in so doing, without his consent and without an opportunity for him to be heard, is without due process of law. That this claim asserted by him, founded on the protection afforded by the National Constitution, is neither frivolous nor palpably unfounded is apparent.

In *Walsh v. Columbus & C. Railroad Co.*, 176 U. S. 469, Mr. Justice Brown, delivering the opinion of the court, said:

"We have repeatedly held that, where the plaintiff relies for his recovery upon the impairment of a contract by subsequent legislation it is for the court to determine whether such contract existed, as well as the question whether the subsequent legislation has im-

paired it. *State Bank of Ohio v. Knoop*, 16 How. 369; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116. This rule also applies to a contract alleged to be raised by a state statute, although the general principle is undoubtedly that the construction put by state courts upon their own statutes will be followed here. *Jefferson Branch Bank v. Skelly*, 1 Black 436; *McGahey v. Virginia*, 135 U. S. 662; *Douglas v. Kentucky*, 168 U. S. 488; *McCullough v. Virginia*, 172 U. S. 102.

“We cannot say that it is so clear that the statute in question is not open to the construction claimed that we ought to dismiss  
62 the writ as frivolous, within the meaning of the cases which hold that, where the question is not of the validity but of the existence of an authority, and we are satisfied that there was and could have been no decision by the state court against any authority of the United States, the writ of error will be dismissed.”

In *Illinois Central Railroad v. Chicago*, 176 U. S. 646, same Justice, delivering the opinion, said:

“Without determining the effect of such ordinance, the question whether it impairs the charter of the company, giving to that charter, a broad construction, is fairly open to contention. *Bacon v. Texas*, 163 U. S. 207, 216; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 5, 10. The claim is certainly not a frivolous one. In determining the existence of a Federal question it is only necessary to show that it is set up in good faith and is not wholly destitute of merit.”

From a consideration of the averments of the bill of complaint in Case No. 8810 I am of the opinion the suit of complainant is one which involves a controversy arising under the provisions of the Federal Constitution, and that the amount in controversy is sufficient to confer jurisdiction on this court.

Therefore, the demurrer, in so far as based on want of jurisdiction, must be overruled.

In regard to the averments of the bill of complaint in Case No. 8816, considered for the purpose of determining its sufficiency to confer jurisdiction on this court, to inquire as to the validity of the act in question, it may be observed, in the first instance, it is wholly immaterial to complainants whether the act be constitutional and valid or unconstitutional and invalid in its scope, operation or effect in its relation to others. Before complainants may be heard to complain they must show by the averments of their bill such a state of facts existing or threatened as will work a justiceable injury to themselves. *Supervisors v. Stanley*, 105 U. S. 305; *Clark v. Kansas City*, 176 U. S. 114; *Smiley v. Kansas*, 196 U. S. 447. As in the present case the parties are each and all citizens of this state, it matters not

63 how much injury may come to complainants by the enforcement of the act, even if it be unconstitutional in matters averred in violation of the provisions of the Constitution of the state, for such matters are exclusively for the consideration and determination of the courts of the state, unless, in addition thereto, the bill presents a state of facts, which in good faith raises a controversy as to the validity of the act arising under the Constitution and laws of the United States, the decision of which controversy may be

determinative of the case. *Metcalf v. Watertown*, 128 U. S. 586; *Tennessee v. Union and Planters' Bank*, 152 U. S. 454; *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571.

Examined in the light of these principles, do the averments of the bill of complaint in Case No. 8816 present a controversy arising under the Constitution and laws of the United States, in which controversy there is involved an amount sufficient to confer jurisdiction on this court?

As seen from the statement made, complainants were corporations of the state, duly organized and doing a banking business within the state at and prior to the date of the passage and taking effect of the act in question. That a part only of complainants are qualified to accept the conditions imposed and receive the benefits of the act in question. That prior to the passage of this act their shareholders were liable only to creditors of the bank to the amount paid for the shares, and in addition, the face value of the shares. That if complainants shall accept the provisions of the act they will impose an additional burden on their shareholders to contribute for losses sustained by depositors in other institutions. That as to those of complainants qualified to accept the provisions of the act, which do not accept, and those disqualified, the advantage obtained by those institutions which do accept the provisions of the act will destroy the business of complainants, the value of the right to continue which exceeds in amount that necessary to confer jurisdiction on this court. That complainants in common with other citizens, tax payers of the state, have been compelled by taxation to contribute to the general revenue fund of the state, which is being employed by defendants to carry the act into operation. That complainants

64 are depositors in and creditors of other state banks which have accepted the conditions and obligations imposed by the act, and that the operation of the act in settling the affairs of such other banks will unjustly discriminate against complainants as creditors of such other banks, and will impair the obligation of complainants' contracts with such banks.

In so far as complainants qualified to accept the provisions of the act, but decline to do so, I see no just cause on their part to complain of discrimination against them. If any are discriminated against by the terms of the act, the privileges of which they may accept, and they decline to do so, it is their failure to accept, and not the law, which causes the injury, and they will not be heard to complain. As to those complainants disqualified from participating in the benefits of the act, it is not shown the condition which produces this disqualification may not be changed by such banks and the provisions of the act then accepted. If so, such of complainants may not be heard to contend of the law's discrimination against them, for, in such case, it is not the law, but the facts constituting the disqualifying conditions which produces the discrimination. This clearly appears from a consideration of the case of *Merchants' Bank v. Pennsylvania*, 167 U. S. 461, wherein Mr. Justice Brewer, delivering the opinion said:

"If it be said that a lack of uniformity renders the statute obnox-

ious to that part of the Fourteenth Amendment to the Federal Constitution which forbids a State to "deny to any person within its jurisdiction the equal protection of the laws" it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all banks shares, whether state or national, rests the ordinary state tax of four mills. To every bank, state and national and all alike, is given the privilege of discharging all tax obligations by collecting from its stockholders and paying eight mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and whose stock is only worth par. So it is possible, under the operation of

65 this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national pay no more than the regulation tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. \* \* \*

"Again, it will be perceived that this inequality in the burden results from a privilege offered to all, and in order to induce prompt payment of taxes, and payment without litigation. To justify the propriety of such inducement, we need look no further than the present litigation."

In so far as the bill avers the misapplication of the revenues of the state raised from complainants and others by taxation, while it is true by reason of the provisions of Chapter 334, Laws of 1905, an injunction may be granted to restrain the illegal levy of any tax, charge, or assessment, or any proceeding to enforce the same, and that an injunction may be granted to restrain any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment, and that any number of persons whose property may be affected by any tax or assessment so levied, or whose burden as tax payers may be increased by the threatened, unauthorized contract or act, may unite in a suit to obtain such relief; and while in a proper case the statutory right of suit here granted might be asserted in this court, yet, it is clear, as between citizens of this state such right cannot be enforced here even if the value of the rights sought to be protected were sufficient to confer jurisdiction on this court, for such controversy does not arise under the Constitution and laws of the United States.

In so far as it is averred in the bill, by the operation of the act in question, the rights of complainants, as depositors and creditors of other state banks which have accepted or threaten to accept the provisions of the act, are discriminated against and their contract rights impaired, it will be noticed it is not averred any such guar-

anted bank in which any complainant has a deposit or credit, has failed, or its affairs are about to be settled under the provisions of the act, hence, of necessity, the prosecution sought against that feature of the act, under the averments of the bill at this time, rests in mere speculation and is based on no tangible right of complainants. If such event shall transpire in future, and this feature of the act of which complaint is made shall be attempted to be enforced, to the impairment of the contract rights of any complainant, a controversy of merit may then arise, but such controversy is not presented by the bill in question.

It follows, the demurrer based on want of jurisdiction in Case No. 8816 must be sustained. And unless complainants, being so advised by their solicitors, shall amend their bill of complaint by the January 1910 rules of this court the bill will stand dismissed for want of jurisdiction.

In so far as the averment of facts contained in the bill of the national Banks is concerned, considered now only for the purpose of determining whether a controversy is thereby presented within the jurisdiction of this court, it may be observed, such corporations are created under, are regulated by and derive their authority solely from national laws, therefore were it not for the act of Congress of July 12, 1882, (amended August 13, 1888) which provides for the purpose of jurisdiction national banks shall be deemed citizens of the state in which they are located, as they are created by virtue of national laws, this court would have jurisdiction over any controversy touching their rights under the law of their creation. *Osborn v. United States Bank*, 9 Wheat. 817; *Pacific Railroad Removal Cases*, 115 U. S. 1; *County of Wilson v. National Bank*, 103 U. S. 770; *Cummings v. National Bank*, 101 U. S. 153; *Butler v. National Home for Soldiers*, 144 U. S. 64; *Wash. & Idaho Rd. v. Cœur D'Alene Ry.* 160 U. S. 77; *Texas & Pacific Railway Co. v. Cox*, 145 U. S. 593.

While by force of the statute, for the purpose of jurisdiction of this court, complainants in case No. 8817 must be deemed citizens of this state, and no jurisdiction of this court may attach by reason of complainants being created by national laws, yet, when a right is asserted by a national bank under authority of the law of its creation, the determination of such right involves a federal question, of which this court has jurisdiction, if the amount involved be sufficient to confer jurisdiction on this court, and jurisdiction once having attached, the court may proceed to a complete determination of the rights of the parties as to all matters in issue.

67 While by section 13 of the act in question the benefits and privileges of the act are tendered national banks doing business in the state, on condition of their submitting to the visitatorial control of state officials, and on condition that such acceptance be authorized by their shareholders and board of directors, in the manner provided in section 1 of the act, and on compliance with the other conditions of the act, yet, that complainants by the very law of their creation are precluded from accepting the terms, conditions and obligations of the act, does not admit of doubt or argu-

ment, but is conceded. Therefore, as the disqualification of complainant national banks to accept the provisions of the act arises not from the consideration of any question of fact but solely and alone from the provisions of the law of their creation, enacted in pursuance of authority conferred on Congress by the national Constitution, which is the supreme law of the land, it must be conclusively presumed the legislature of the state in enacting the act in question, notwithstanding the provisions of section 13, knew complainants could not accept the conditions and obligations of the act, receive the benefits thereof, or be found thereby.

Bearing in mind these general observations the jurisdiction of this court over the controversy presented by the facts charged in the bill will be considered.

As has been seen by the statement made, the facts relied upon to confer such jurisdiction are: (1) That complainants are by the act unjustly discriminated against: (a) because not entitled to share its benefits and protection in common with others; (b) as depositors and creditors of state banks which have accepted the provisions of the act in the liquidation of their affairs. (2) That it was the object, intent and purpose of the act to destroy the business of complainants as national banks, and that in its actual operation such is its effect, and that the value of the right of each complainant to continue in the business transacted by it is in excess of the amount necessary to confer jurisdiction on this court. (3) That complainants are, in common with others, being assessed under the revenue laws of the state and have paid into the treasury of the state large sums of money raised by taxation, which is being by defendant officials unlawfully expended in putting the act  
68 in operation the benefits of which complainants may not enjoy.

In so far as complaint is made of the act in question, that its operation will discriminate against complainants as depositors in or creditors of those banks of the state which are qualified to and do accept the provisions of the act in the liquidation of the affairs of such banks after insolvency has intervened, as has been said, in case No. 8816 of the state banks, the bill in this case does not charge any such imminent injury as stands in need of protection at this time. Any such injury to complainant must depend; (1) on the failure of such guaranteed state bank; (2) that complainants, or some one of them, shall, at the date of such failure, be a depositor in or creditor of such a bank. Therefore, it will be sufficient if the rights of complainants in this respect shall be considered when a case arises in which relief against a threatened injury is actually existent and apparent.

In so far as the bill charges defendants with the misapplication of funds raised by taxation from complainants and others, in carrying the act in question into operation and effect and seeks to restrain such unauthorized act of expenditure by defendant officials, I am persuaded; (1) Chapter 334, Laws of 1905, the provisions of which have been heretofore stated, confers a right of suit which may be enforced by complainants in protecting the interests of their

shareholders. *Pelton v. National Bank*, 101 U. S. 143; *Cummings v. National Bank*, 101 U. S. 153; *Hills v. Exchange Bank*, 105 U. S. 319; (2) That in a proper case, and by the word "proper" I mean a case over which this court has jurisdiction, such statutory right of suit as is therein granted may be enforced by a Circuit Court of the United States sitting in equity. *Van Norden v. Morton*, 99 U. S. 378; *Norwood v. Baker*, 172 U. S. 269; *Cummings v. National Bank*, *supra*; *San Francisco National Bank v. Dodge*, 197 U. S. 70; *Williams v. Crabb*, 117 Fed. 193; *Platt v. Lecocq*, 168 Fed. 723. (3) As the statute permits any number of persons, whose burdens as tax payers may be increased by the doing of the threatened, unauthorized act of an official, to join in the complaint brought to obtain the injunctive relief, it is the value of the right sought to be protected from invasion by the doing of the unlawful act  
 69 threatened and not the interest of each separate complainant as measured by the amount its burden of taxation will be increased, that determines the amount in controversy, considered for the purpose of establishing the jurisdiction of the court, in which suit is brought. *Gibson v. Corbin*, 112 U. S. 36; *Brown v. Trousdale*, 138 U. S. 389; *Ogden City v. Armstrong*, 168 U. S. 224; *City of Ottumwa v. Water Supply Co.* 119 Fed. 315; *Johnston v. City of Pittsburg*, 107 Fed. 763; *Board of Trustees v. Berryman*, 156 Fed. 112.

However, if the right of complainants to bring and maintain such suit be based either on the authority of the statute of the state to which reference has been made, or if it be traced to the general principles of right and justice, to which reference is made by the court in *Crampton v. Zabriskie*, 101 U. S. 601, it is equally clear, since the passage of the act of June 12, 1882, fixing the citizenship of national banks for the purpose of jurisdiction in the state in which they are chartered to engage in business, such suit may not be instituted by complainants in this court no matter what may be the amount in controversy, for the determination of the right asserted does not involve the construction of the Constitution or laws of the United States, hence, does not raise a Federal question. However as has been seen, since in a suit involving such controversy over which a Federal court has jurisdiction on other grounds, such as the diverse citizenship of the parties, or when the controversy arises between citizens of the same state, and by reason of the state of facts charged in the bill the relief is not demanded alone by virtue of such state statutory right, but facts sufficient in addition thereto are averred to entitle complainants to the relief prayed, based on the construction of the Constitution or laws of the United States so as to clearly raise a Federal question, a Circuit Court of the United States may take jurisdiction, and having so done, may proceed to a determination of the entire controversy.

There remains for consideration in determining the jurisdiction of this court over the controversy presented by the bill only the charge that the act denies to complainants the equal protection of the law, in violation of the Fourteenth Amendment.



70 It is true, as contended by demur-ant, in so far as the intent of the legislature in the passage of the act, and its natural and necessary operation and effect is concerned, such matters must be gathered by the court from a consideration of the terms of the act itself, and are not controlled by the averments of the pleader drafting the bill. *Dillon v. Barnard*, 21 Wall. 430; *Equitable Life Assurance Soc. v. Brown*, 213 U. S. 25. However, as the bill in accepted the provisions of the act, and that the act in its actual operation and effect, induces depositors of complainants to withdraw their deposits from complainants and deposit in banks which have accepted the provisions of the act, and that the act in its actual operation is destructive of the business of complainants, such statements must be treated as averments of actual existing facts susceptible of proof. Therefore, in the light of the facts averred in the bill of complaint in this case, I am of the opinion sufficient is averred to require a consideration of the validity of the act under the provisions of the Fourteenth Amendment to the Constitution, and to require the taking of proofs if denied. Therefore, the demurrer to the complaint in this case, based on lack of jurisdiction in the court, must be overruled.

Coming now to a consideration of the act itself for the purpose of determining its validity in respect to those matters charged against it in the bills in cases numbered 8810 and 8817 it should be observed, if the act be not found clearly in violation of the provisions of the national Constitution and laws in respect to the matters charged its validity must be maintained. With the policy of the act, if valid, whether it shall prove in operation beneficial or detrimental, courts have no concern. That is a question to be considered alone by the law making power of the state, and for which the courts assume no responsibility. If, however, from a consideration of the provisions of the act itself, and the charges made in the complaints in connection with the rights of the parties litigant, as prescribed in and guaranteed by the provisions of the *natural* Constitution, as construed by the highest judicial tribunal in this land, it be found the law making power of the state has clearly exceeded its constitutional powers, to the damage of complainants, in matters charged in  
71 the bills, then no alternative is left but to so declare. For this purpose courts were established, to which litigants having a justiciable controversy therein have an absolute right to resort, which right may not be denied them, and from which resort they may not be turned away, their cause unheard.

Chief Justice Marshall in the great case of *Cohens v. Virginia* 6 Wheat. 264, said:

"It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot as the legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is

not given. The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

The charges made by complainant in Case No. 8810 against the act, are: (1) That it impairs the obligation of his contract and the contracts of these similarly situated with him, as shareholders, in violation of Article 1 of Section 10 of the national Constitution; (2) that the act and its acceptance by the Bank, and the deposit of the funds of the bank, under the requirements of the act, with the treasurer of the state, to be distributed in accordance with its provisions, deprives complainant, and those similarly situated with him, of their property without due process of law.

In case No. 8817, the sole question presented is, that the act in question discriminates against complainants to their injury and denies them the equal protection of the law, in violation of the provisions of the Fifth and Fourteenth Amendments to the national Constitution.

Article 11, Section 1, of the Constitution of this state, provides:

"The legislative power of this state shall be vested in a house of representatives and senate."

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By this provision of our State Constitution all legislative power possessed by the people of the state in their collective capacity except that which has been in express terms, or by necessary implication, by the Constitution of the United States conferred on the national Congress, resides in the legislature of this state, except in so far as by the terms of the state Constitution the people have reserved such power to themselves or restrained that body from its exercise.

It will be observed by section 1 of the act in question, the legislature has not attempted the direct exercise of its power on any person, natural or corporate, within its jurisdiction. It has not by the exercise of its legislative power declared a necessity that any depositor in any bank shall be secured from loss, nor that any banking institution shall provide a guarantee fund for its depositors, or any class of such depositors. In other words, the act in question, of its own weight, touches no subject in either person or property. Before it becomes of any force or effect as a rule of action or conduct for the government of banking associations, the existence of three contingencies, depending on facts, must be established. (1) The institution must be an incorporated banking association doing business in the state, possessing the qualifications required by the act; (2) Such banking association must through its board of directors, authorized by its shareholders, pass a resolution accepting the provisions of the act; (3) on the filing of such resolution with the bank commissioner of the state he is required to make an examination of the affairs of the institution, and if found by him from such examination to be properly managed in accordance with the banking laws of the state, and it shall deposit with the treasurer bonds or money in accordance with the provisions of the act, the bank commissioner shall issue his certificate of authorization.

What the legal effect of this act may be after its passage and approval before any banking association had accepted its provisions, or as to any banking association before such acceptance, raises a question of some doubt. For, it is clear, as the form of government of the States of this nation, and the nation itself, is not purely republican but is a representative republican form of government; and as by the terms of our state Constitution all legislative power  
 73 possessed by the state has been conferred on a house of representatives and senate in legislative session assembled, that all the electors of the state at an election called for that purpose voting in favor of the adoption of the provisions of the act in question, could not have constituted it a law of the state. Hence, as it is beyond the power to all of the electors of the state by their expressed consent to constitute the provisions of the act in question a law of the state, does it not follow, of necessity, that which is ineffectual to bind any citizen of the state as law, without the consent of the citizen, cannot become binding in any other than a contractual sense from its acceptance by the person to be bound thereby.

However, this may be, one thing is clear, the act being permissive only, and not compulsory, and depending on its acceptance by the person to be bound thereby, and not alone on the law making will, the source of its authority may not be traced to the exercise of the police power of the state. For, the police power of the state is a power resorted to of necessity in the protection and promotion of the health, comfort, safety and welfare of society. Being a law of force and necessity, of restraints and prohibitions, it may not be by the state committed to the judgment of the citizen to determine whether he will or will not be bound by its exercise. Tiedman's Limitations of Police Powers, Section 1; Freund on Police Power, sec. 3, 8, and 22; Loener v. New York, 198 U. S. 45; C. B. & Q. Railway v. Drainage Comm's, 200 U. S. 561; Lawton v. Steele, 152 U. S. 133; Reduction Company v. Sanitary Works, 199 U. S. 306; Gardner v. Michigan, 199 U. S. 325; Ritchie v. People, 155 Ill. 98; People v. Stede, 231 Ill. 340.

Counsel for the defense in their brief assert the effect of the act in question to be only "*a permit by the state for banking corporations to amend the charters under which they are doing business.*" If this statement of the extent and effect of the law be accepted, the question presented is, can the state lawfully authorize a majority of the shareholders of the Bank to so amend its charter as to pledge a portion of its assets to secure the obligations of third persons as against the protest of a dissenting shareholder, and does not such  
 74 authorization by the state operate to deprive a dissenting shareholder of his property without due process of law? And does not the act of the Bank in making a pledge of its property under such authorization impair the binding force of the contract of the dissenting shareholder with the Bank and the state?

Section 1, Article 12, of the Constitution of the state provides:

"The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

The Bank in this case was created under the general incorporation act of the state. The manner in which its funds might be invested was prescribed by section 417, General Statutes 1901, as follows:

"No bank shall employ its moneys, directly or indirectly in trade or commerce, by buying and selling goods, chattels, wares and merchandise, and shall not invest any of its funds in the stock of any other bank or corporation, nor make any loans or discounts on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith."

That the charter of a private corporation having a capital stock, such as the Bank in question, constitutes a contract between the state and the corporation, between the state and the shareholder in the corporation, and between the corporation and its shareholders, must be conceded to be settled by the authorities. *State Bank of Ohio v. Knoop*, 16 How. 369; *Cooley on Const. Limitations*, 5th ed. sec. 337; *Livingston v. Lynch*, 4 Johns Ch. 573; *Hatch v. Irving*, 2 Coppers, Ch. 358. That under the power of amendment and repeal reserved in the Constitution of this state, the legislature may take away and destroy all charter, rights and privileges granted for governmental purposes, and not creating a private contract, must be conceded. But, if this is done, the contract rights of the shareholders to the property after the payment of the obligations of the corporation, still remain. Mr. Justice Miller, delivering the opinion of the court in *Greenwood v. Freight Co.*, 105 U. S. 13 said:

"Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such repeal; 75 and the courts may, if the legislature does not provide some special remedy, enforce such rights by the same means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and their must remain in the courts the power to protect those rights."

In *Wilmington Railroad v. Reid*, 15 Wall. Mr. Justice Davis, delivering the opinion, said:

"It has been so often decided by this court that a charter of incorporation granted by a state creates a contract between the state and the incorporators, which the state cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded."

Again, that under the power reserved in the Constitution the legislature may lawfully amend the provisions of the general incorporation law under which the Bank was incorporated, must be and is conceded. But to this power of amendment there is a limitation set beyond which the state may not go.

In *Shields v. Ohio*, 95 U. S. 319, Mr. Justice Swayne, delivering the opinion of the court said:

"The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserve powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases."

The property of a shareholder may be used by the corporation in any legitimate manner to further the business for which the corporation was created, and the state may, under its reserve power of amendment from time to time change the manner of such use and the means employed to further the purpose for which the corporation was created, but "a material and fundamental change in the charter by an amendment to that charter is an unconstitutional violation of the contract rights of any shareholder who does not consent to such an amendment." Cook on Stock and Stockholders, 3d ed. sec. 500; Marietta, etc. R. R. Co. v. Elliott 100 St. 57; Fry's Executor v. Lexington etc. R. R. Co. 2 Metc. (Ky.) 314; Hill v. Glasgow R. Co. et al. 41 Fed. 610; Stephens v. Rutland R. R. Co. 29 Vt. 545; Middlesex Turnpike Corporation v. Locke, 8 Mass. 268; Cherokee Iron Co. v. Jones, 52 Ga. 276.

That the act of the bank in pledging its property, as has been done in this case, to be applied to the discharge of the obligations of third parties, in the absence of the authorization of the act in question, would be an act beyond its authority, *ultra vires* and void, must be conceded. That the contract of the depositor with a bank is a private contract, and that money taken for the purpose of reimbursing such depositor for loss sustained, or which may be sustained on such contract, is a taking of property for a private and not a public or governmental purpose is conclusively settled. State v. Township of Osawkee, 14 Kan. 418; Lowell v. Boston, 111 Mass. 454. That the state may not through the exercise of the power of taxation, or by the exercise of any other governmental power, take private property for a purely private purpose is also conclusively established. Loan Ass'n v. Topeka, 20 Wall. 655; Parkersburg v. Brown, 106 U. S. 487; Cole v. La Grange, 113 U. S. 1; Dobbins v. Los Angeles, 195 U. S. 223; Mo. Pac. Ry. v. Nebraska, 164 U. S. 403; Dodge v. Mission Township, 107 Fed. 827; Crescent Liquor Co. v. Platt, 148 Fed. 894; Alma Coal Co. v. Cozad, 79 O. St. 344; Baltimore & Eastern Ry. Co. v. Spring, 89 Md. 510; Lucas v. State 75 O. St. 114; State vs. Froehlich 118 Wis. 129; William Deering & Co. v. Peterson, 75 Minn. 118; State v. Switzler, 143 Mo. 287.

As, therefore, an attempt on the part of the Bank to employ its property for the purpose of securing the contract of deposit made by an individual with another bank, or in reimbursing such depositor for loss sustained on his contract, is clearly beyond its power and void as against complainant, a shareholder in the Bank; and as the use of money for such purpose is a purely private use, for which the state may not take it, it follows, of necessity, that which is beyond the power of the state to take directly is beyond its power to

authorize a corporation of its creation to take for such purpose, against the protest of complainant, a minority shareholder dissenting therefrom, and it must be held the act of the state in attempting to confer such power on the Bank impairs the obligations of the contract of complainant who dissents therefrom, with the Bank, and with the state, in violation of section 10 of the national constitution. Such a taking is also without due process of law and in violation of the Fourteenth Amendment to the Federal Constitution.

As to what constitutes due process of law, Mr. Justice Brown, in *Holden v. Hardy*, 169 U. S. 366, said:

"Recognizing the difficulty in defining with exactness, the phrase "due process of law" it is certain that these words imply conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation."

It follows, the demurrer, for want of equity, in case No. 8810 must be overruled.

Is there want of equity in the averments of the bill in case No. 8817 of the national banks? It is true, as asserted by complainants in this case, national banks are created by authority of Congress for a public purpose, and are necessary instrumentalities and agencies of the general government. In *Osborn v. United States Bank*, 9 Wheat. 738, Chief Justice Marshall, delivering the opinion of the court, said:

"Let this distinction be considered.

"Why is it, that Congress can incorporate or create a bank? This question was answered in the case of *McCulloch v. State of Maryland*. It is an instrument which is "Necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of its charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of subject, the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle, with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and the right to sentence him to total deprivation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute."

In *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29, Mr. Justice Wayne, delivering the opinion of the court, said:

"The national banks organized under the act are instruments de-

signed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is "an abuse, because it is usurpation of power which a single state cannot give." Against the national will "the States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. *Bank of the United States v. McCulloch*, supra; *Weston and Others v. Charleston*, 2 Pet. 466; *Brown v. Maryland*, 12 Wheat. 419; *Dobbins v. Erie County* id. 419. The power to create carries with it the power to preserve. The latter is a corollary from the former.

"The principle announced in the authorities cited is indispensable to the efficiency, the independence and indeed, to the beneficial existence, of the General Government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every state in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed."

In *Davis v. Elmira Savings Bank*, 161 U. S. 275, Mr. Justice White, delivering the opinion of the court, said:

"National Banks are instrumentalities of the federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

In *Easton v. Iowa*, 188 U. S. 220, Mr. Justice Shiras delivering the opinion of the court said:

"That legislation has in view the erection of a system extending throughout the country, and independent, so far as power is conferred or concerned, of state legislation which, if permitted to be applicable might, impose limitations and restrictions as various and numerous as the states. Having due regard to the national character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain."

In *McClellan v. Chipman*, 164 U. S. 347, Mr. Justice White, delivering an opinion of the court, said:



"National banks "are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when state law, incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." National bank vs. Commonwealth, 9 Wall. 362.

In the light of this relation of complainants, as national banks to the general government and the state, taking into consideration the fact that national banks by the very law of their creation, which all are conclusively presumed to know, are disqualified and prohibited from accepting the provisions of the act in question, and that the legislature of the state, notwithstanding the provisions of section 13 of the act knew at the time of its passage complainants were so prohibited; and further, considering the averments of the bill, not only that the act in its actual operation was intended to deprive complainants of their customers and business, thus injuring the rights of their shareholders and impairing their efficiency to discharge the public duties for which they were created, to such an extent as to destroy their business and compel them to surrender their charters, but that in actual operation by the employment of such means, instrumentalities and devices as are authorized by the act to be employed by those state incorporated banks which have accepted the provisions of the act, such is its actual effect in operation, can there be a doubt of the right of complainants to relief from such unhappy situation, or that an act of the state authorizing corporate citizens of its creation to so embarrass and destroy other citizens created by national authority, which cannot escape by accepting its terms is such an unjust and unreasonable discrimination as amounts to a denial to complainants of the equal protection of the laws? If it were within the power of complainants, as it is of incorporated state banks, to accept the provisions of the act, and thus escape the embarrassment of their situation, they would not, perhaps, be heard to complain on this ground. Or, if their disqualification arose from a state of facts admitting of reasonable adjustment, they might not, perhaps, be heard to complain of the discrimination of the law against them, for by the terms of the act, all are invited, under certain conditions, to assume its burdens and accept its benefits. But, as to complainants, disqualified by the law of their very existence, the benefits and obligations of which they must surrender before they may accept the invitation extended, the very invitation itself becomes a mere *brutum fulmen* and is in legal effect as though complainants, by name, had been expressly forbidden and prohibited from accepting and enjoying the privileges extended by the act to those institutions of state origin qualified, or which may become qualified, under its terms.

From a consideration of the provisions of the act in question for the purpose of discovering its true intent, object and purpose, in view of the fact that national banks are prohibited from accepting its



provisions and participating therein, and as such prohibition arises from the law of their creation, which is conclusively presumed to be known of all men, it must be found the true intent, object and purpose of the act in question was to enable certain banks incorporated under the laws of the state, by accepting its provisions, to create and maintain a fund in possession of the treasurer of the state, to be employed for the purpose of securing the payment of certain favored contracts of deposit made with any bank contributing to such fund in case of the insolvency of any contributing bank, to the exclusion of all other contract creditors with such insolvent bank, and for the purpose of making public display of the fact that the deposits with any contributing bank are guaranteed under the terms of the act for the purpose of attracting depositors to such bank. If this be its true intent and purpose must not the natural and inevitable effect of such an act be to attract deposits, and especially those of the guaranteed class, from all other banks not participating, and draw them into the banks co-operating with the state in the enterprise, to the disadvantage and loss of those prohibited from participating. This is the actual effect of the arrangement in operation as averred by complainants in their bill.

The question of grave and controlling importance is, does such legislation by, and co-operation of the sovereign state with banks of its creation, violate rights guaranteed to complainants by the national Constitution and laws enacted in pursuance thereof, which are alike the supreme law of the land, and the law of complainants' existence.

It is true, as contended by defendants, this law does not operate directly in any manner on complainants. It in no way controls or regulates the conduct of their business affairs. It prescribe no rules for complainants' guidance and prefixes no penalties for their violation. It directly creates no burden which they must assume and carry, therefore it is confidently asserted by demurrants, whatever disadvantage in business affairs, inconvenience or loss may befall complainants from the actual operation of the act is merely incidental to the lawful exercise of legislative power by the state, therefore they will not be heard to complain.

The government through the lawful exercise of its constitutional power has deemed it wise to create its instrumentalities and agents in all parts of this commonwealth, in the necessary and convenient transaction of its public governmental affairs, the continued existence of which, with functions unimpaired, are as essential to the objects of government as was their creation in the first instance; therefore, wherever the power of the government was exerted for the establishment of such necessary instrumentalities, does not the power of the government extend for their protection against destruction or impairment of their ability to discharge the public functions which were the object of their creation, and this regardless of the fact as to whether the force destructive of their continued existence or vitality arises from a direct exercise of the power of the state against them, or such destructive force be created against

them on the part of the state by indirection? Must not the power to create a life, the continued existence of which is necessary for the purpose of the creator, of necessity include the power to preserve that life, with vigor unimpaired, against a destructive force arising from one source as well as another? I think this must be true. In the great case of *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, Chief Justice Marshall, delivering the opinion of the court, said:

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government within limited and unlimited powers is abolished, if those limits do not confine the persons on which they are imposed, and if acts prohibited and acts allowed, are of equal obligation."

In *Hugler v. Kansas*, 123 U. S. 623, Mr. Justice Harlan, delivering the opinion of the court, said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature, had transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has not real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In reason, therefore, may not complainants, as national  
83 banks, challenge the constitutional validity of the act which confers privileges on incorporated banks of the state which are denied to them, not from choice but by the law of their existence, with like propriety and effect as though the act cast on complainants burdens from which such state banks are by the terms of the act exempt? And do not the authorities controlling here so declare?

The language of the Fourteenth Amendment is:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, *nor deny to any person within its jurisdiction the equal protection of the laws.*"

Mr. Justice Field, in *Hayes v. Missouri*, 120 U. S. 68, said:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier v. Connolly*, speaking of the Fourteenth Amendment: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the

sphere of its operation it affects alike all persons similarly situated, is not within the amendment." 113 U. S. 27, 32.

In *Yick Wo v. Hopkins*, 118 U. S. 356 Mr. Justice Matthews, delivering the opinion of the court, said:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, or color or of nationality; and the equal protection of the laws is a pl-dge of the protection of equal laws."

84 In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, Mr. Justice Harlan, delivering the opinion of the court, said:

"We have also said: 'The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; undoubtedly intended not only that there should be no arbitrary deprivation of life, or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences.'"

In *Regan v. Farmers Loan & Trust Co.* 154 U. S. 362 Mr. Justice Brewer, delivering the opinion of the court said:

"The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

85 In *Cotting v. Kansas City Stock Yards Co. &c.* 183 U. S., 79, Mr. Justice Brewer, delivering the opinion of the court, and quoting with approval from the opinion of Judge Catron in *Vanzant v. Waddel*, 2 Yerger 260 said:

"Every partial or private law, which directly proposes to destroy

or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law by another."

In *State v. Goodwill*, 33 W. Va. 179, it is said:

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void."

"The inhibition of the Fourteenth Amendment, that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons being singled out as a special subject for discrimination and favoring legislation." *State v. Mitchell*, 97 Me. 66.

In *McKinster v. Sager*, 163 Ind. 671, that court said:

"But it is not the business of the state to make discriminations in favor of one class against another, or in favor of one employment against another. The state can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws."

In the light of the foregoing authorities, it must be held, a legislative enactment that confers special privileges and benefits on a class which, by the law, and not by conditions are denied to another class in the same business or calling, and which privileges and benefits so conferred on the favored class may be and are employed to impair and destroy the business of those belonging to the excluded class, is inhibited by the provisions of the Fourteenth Amendment to the National Constitution. And more especially must this be true, I think, in a case such as this, where the business conducted by the

86 excluded class is not only of the same nature and character as that transacted by the favored class, and is conducted in the same city, town or locality, and in competition one class with the other; but, further, where the class excluded from participating in the privileges and benefits of the act, was created for a public purpose, and the members are charged with the performance of important governmental functions requisite and necessary to be transacted promptly and efficiently in maintaining the stability, dignity, and perpetuity of the government itself. While it is true, such agencies created by the general government to assist in the discharge of its public governmental affairs, must, of necessity, come in competition with institutions transacting like business created by the several states, and must, when subjected to the enforcement of like and equal laws survive or perish as the transaction of their business may prove successful and profitable, or the reverse, yet it cannot be true that the States may, at will, either by virtue of direct legislative enactments, impair or destroy the efficiency or existence of such national institutions or indirectly by making institutions of their creation favorites of the law, confer such special privileges and

benefits on them that the national institution cannot in competition with them, endure. For, in the end, the great financial business interests of the people of this country, entrusted to the care and keeping of banking institutions, must depend for its security and prompt adjustment more on the known honesty, ability and conservatism of those in charge of the affairs of such institution than in the control exercised over them by law. Lasting financial security and permanent commercial prosperity has ever come and can only come to a state from confidence by man reposed in the honesty of purpose, the integrity of character, and the fidelity to duty of his fellowman. It can never come from the operation of unequal, unjust or partial laws.

As said by Mr. Justice White, in closing the opinion of the court in *Davis v. Elmira Savings Bank*, *supra*:

"Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of Congressional legislation.

87 Much was said in argument as to the public policy embodied in the laws of the State of New York and the wisdom of upholding it. Our function is judicial and not legislative. Did we, however, consider motives of public policy, we should not be unmindful of the wise safeguard, in favor of all the people of the United States, resulting from the provision which secures to every one dealing with a national bank, a ratable distribution of the assets thereof, thereby stimulating confidence and uniformity of treatment."

Or, as said by Mr. Justice Matthews, delivering the opinion of the court in *Yick Wo v. Hopkins*, *supra*:

"This conclusion and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within

the prohibition of the Constitution. The principle of interpretation has been sanctioned by this court in *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman* 92 U. S. 273; *Ex Parte Virginia* 100 U. S. 339; *Heal v. Delaware*, 103 U. S. 370; and *Soon Hing v. Crowley*, 113 U. S. 703."

It follows, from what has been said, the demurrers in cases 88 numbers 8810 and 8817 must be overruled and denied. And defendants are ruled to answer the bills in said cases, if so advised by their solicitors, by the January 1910 rules of this court. Failing to so answer, the bills will be taken as confessed.

Applications for temporary injunctions having been presented on due notice, and full argument by solicitors for the respective parties, and submitted for decision, with the demurrers to the bills, the application in case No. 8816 of the state banks, will be dismissed.

In case of Larabee, No. 8810, a temporary injunction will issue restraining the officials of the Bank, its officers, agents, servants and employes from further expenditure by the Bank in complying with the terms of the act, and from further compliance with the terms of the act. Also, restraining defendant, Mark Tulley, as treasurer of the state, from disbursing the moneys of the Bank in his hands to any person or persons except in restoring it to the custody of the Bank. And further restraining Joseph N. Dolley, bank commissioner of the state of Kansas, from issuing or delivering to the officials of the Bank any certificate of authority empowering the Bank to conduct its affairs under the provisions of the act, or from in any manner attempting to enforce the provisions of the act in question, or any of the same, against the Bank, its officers, agents, servants, employes or property, until the further order of this court, on the giving of a bond in the sum of five thousand dollars, to be approved by the clerk or judge of this court.

In case No. 8817, of the national banks, as the rights of complainants may not be protected in any other manner save by a broad decree a writ of temporary injunction will issue, as prayed in the bill, to remain in force until the further order of this court, on the giving and approval by the judge or clerk of this court of a bond in the penal sum of fifty thousand (\$50,000) dollars, conditioned as by the law provided.

It is so ordered.

JOHN C. POLLOCK, *Judge*.

Kansas City, Kansas, December 23, 1909.

Endorsed: Nos. 8810, 8816, 8817. Opinion. Filed Dec. 23, 1909. Geo. F. Sharitt, clerk.

89 In the Circuit Court of the United States for the District of  
Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA et al., Complainants,  
vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas;  
Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

*Order.*

This cause having heretofore been argued, heard, submitted and taken under advisement upon the bill of complaint of the complainant herein as amended, and upon the demurrer of said defendants to said bill, the court having considered the same and being fully advised in the premises, it is now by the court on this 24th day of December, 1909,

Ordered That the said demurrer be, and the same is hereby sustained; and it is by the court further

Ordered That unless complainants apply for leave to plead further on or prior to the January 1910 rule day, said bill will stand as dismissed.

JOHN C. POLLOCK, *Judge.*

Approved as to form:

F. S. JACKSON, *Att'y Gen.*

Endorsed: No. 8816. In the Circuit Court of the United States for the District of Kansas, 1st Division. Assaria State Bank et al., Plaintiff, vs. Joseph N. Dolley, as Bank Commissioner of State of Kansas, et al., Defendants. Order demurrer sustained. Filed December 24, 1909. Geo. F. Sharitt, clerk. Gleed, Ware & Gleed, Attorneys for Complainants, Topeka, Kansas.

90 In the Circuit Court of the United States for the District of  
Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA et al., Complainants,  
vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas;  
Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

*Order.*

This cause having been heretofore argued, heard, submitted and taken under advisement upon the bill of complaint of the complainants as amended, and upon the application of the complainants for



a temporary injunction herein, and the court having considered the same and being fully advised in the premises, it is now by the court on this 24th day of December, 1909,

Ordered That said application for a temporary injunction be, and the same hereby is, denied.

JOHN C. POLLOCK, *Judge*.

Approved as to form:

F. S. JACKSON, *Att'y Gen.*

Endorsed: 8816. In the Circuit Court for the District of Kansas, 1st Division. Assaria State Bank et al., Plaintiff- vs. Joseph N. Dolley, as Bank Commissioner of State of Kansas, et al., Defendants. Order denying restraining order. Filed December 24, 1909. Geo. F. Sharitt, clerk. Gleed, Ware & Gleed, attorneys for Complainants, Topeka, Kansas.

91 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8816.

ASSARIA STATE BANK OF ASSARIA et al., Complainants,

vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas;  
Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

*Decree.*

Whereas on the 24th day of December 1909, it was ordered and decreed in the above entitled cause that the defendants' demurrer to the complainants' bill of complaint be sustained and that unless complainants should apply for leave to plead further on or prior to the January 1910 rule day, said bill should stand dismissed and;

Whereas said complainants have not made application to the court for leave to plead further in the premises;

It is therefore ordered that the complainants' bill of complaint be and the same is hereby dismissed at the cost of the complainants.

JOHN C. POLLOCK, *Judge*.

Endorsed: No. 8816. In the Circuit Court of the United States, District of Kansas, First Division. Assaria State Bank et al., Complainants, vs. Joseph N. Dolley, Defendants. Decree. Filed May 16, 1910. Geo. F. Sharitt, clerk.

92 In the Circuit Court of the United States for the District of Kansas, First Division.

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia; Danville State Bank, of Danville; State Bank of Downs, Downs; Union State Bank, of Downs; Falun State Bank of Falun; Marion County State Bank, of Florence; Ford State Bank, of Ford; Citizens State Bank, of Frankfort; Farmers State Bank of Greensburg; Citizens State Bank, of Grenola; Bank of Hamlin, of Hamlin; Farmers & Merchants State Bank, of Harper; Farmers State Bank, of Hazelton; Morrill and Janes Bank, of Hiawatha; State Bank of Holton, of Holton; State Bank of Home City, of Home City; Bank of Horton; Iuka State Bank, of Iuka; Jamestown State Bank, of Jamestown; State Bank of Jennings, of Jennings; State Bank of Lancaster, of Lancaster; Exchange Bank of Lenora; McPherson Bank, of McPherson; Citizens State Bank of Medicine Lodge; Muscotah State Bank, of Muscotah; Olsburg State Bank, of Olsburg; Peru State Bank, of Peru; First State Bank of Portis; Bank of Powhattan, Powhattan; Peoples Bank of Pratt; Sharon Valley State Bank of Sharon; South Haven Bank, of South Haven; Kendall State Bank of Valley Falls; Security State Bank, of Wellington; Wilmore State Bank, of Wilmore; Farmers State Bank, of Whiting; Willis State Bank, of Willis; Bank of Winchester, of Winchester; Citizens Bank of Hazelton, Complainants,

vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

*Assignment of Errors.*

93 Comes now the above named complainants, Assaria State Bank of Assaria, Citizens Bank of Axtell, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia, Danville State Bank of Danville, State Bank of Downs, Downs, Union State Bank of Downs, Falun State Bank of Falun, Marion County State Bank of Florence, Ford State Bank of Ford, Citizens Bank, of Frankfort, Farmers State Bank, of Greensburg, Citizens State Bank of Grenola, Bank of Hamlin, of Hamlin, Farmers & Merchants State Bank of Harper, Farmers State Bank of Hazelton, Morrill and Janes Bank, of Hiawatha, State Bank of Holton, of Holton, State Bank of Home City, of Home City, Bank of Horton, Iuka State Bank, of Iuka, Jamestown State Bank, of

Jamestown, State Bank of Jennings, of Jennings, State Bank of Lancaster, of Lancaster, Exchange Bank of Lenora, McPherson Bank of McPherson, Citizens State Bank of Medicine Lodge, Muscotah State Bank, of Muscotah, Olsburg State Bank, of Olsburg, Peru State Bank, of Peru, First State Bank of Portis, Bank of Powhattan, Powhattan, Peoples Bank of Pratt, Sharon Valley State Bank of Sharon, South Haven Bank, of South Haven, Kendall State Bank of Valley Falls, Security State Bank, of Wellington, Wilmore State Bank, of Wilmore, Farmers State Bank of Whiting, Willis State Bank, of Willis, Bank of Winchester, of Winchester, Citizens Bank of Hazelton, and file the following assignment of errors:

First. That the said court erred in entering its decree and order sustaining the demurrer of the defendants and dismissing the complainants' bill of complaint.

Second. The said court erred in ruling that the complainants' bill of complaint did not set forth sufficient facts to entitle the said complainants to an order of injunction against the defendants as prayed in the said bill of complaint.

Third. The said court erred in holding that the complainant banks are not unduly and unlawfully discriminated against in violation of the Constitution of the United States by Chapter 61, Laws of 1909 of the State of Kansas, commonly known as the Bank Guaranty law of the State of Kansas.

94 Fourth. The said court erred in holding that because the said complainant banks might accept the privileges of the Bank Guaranty Law of the State of Kansas, (Chapter 61, Laws of 1909) the complainant banks are not unlawfully and wrongfully discriminated against by the said Bank Guaranty Law, and, therefore can not be heard to complain of the said law.

Fifth. The said court erred in holding that the complainant banks which are disqualified from participating in the benefits of the Kansas Bank Guaranty Act, (Chapter 61, Laws of 1909) are not unlawfully and wrongfully discriminated against by the said Act.

Sixth. The said court erred in holding that the complainant banks are not discriminated against and their contract rights are not impaired on the ground that it is not averred in the bill of complaint that any of the banks in which the complainant banks have deposits, credits or contract obligations have failed, or their affairs about to be settled under the provisions of the Kansas Bank Guaranty Act.

Seventh. The said court should have found that Chapter 61, of the Laws of 1909 of the State of Kansas, commonly known as the Bank Guaranty Act of the State of Kansas, unjustly and unlawfully discriminated against each and all of the complainant banks, and deprived each and all of the complainant banks of property without due process of law, and was, and is, as to each of the complainant

banks, in violation of Section 10, of Article 1, of the Constitution of the United States, which forbids any state passing a law impairing the obligation of contracts, and in violation of Section 1 of Article 14, of Amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which denies to any person within its jurisdiction the equal protection of the laws, and is in violation of Section 17 of Article 2 of the Constitution of the State of Kansas which provides: "all laws of a general nature shall have a uniform operation" throughout the state, and is in violation of Section 16 of Article 2 of the Constitution of the State of Kansas, which provides: "No law shall be revived or amended, unless the new act contain the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed," and by reason of the premises that (Chapter 61 of the Laws of 1909) of the State of Kansas, commonly known as 95 the Bank Guaranty Act of the State of Kansas is unconstitutional, null and void, and that its enforcement would result in damage and irreparable injury to the complainants and each of them.

CHESTER I. LONG,  
JOHN L. HUNT,  
J. W. GLEED,

*Solicitors for Complainants.*

B. P. WAGGENER,  
JOHN L. WEBSTER,

*Of Counsel.*

Endorsed: No. 8816. In the Circuit Court of the United States, District of Kansas, First Division. Assaria State Bank et al., Complainants, vs. Joseph N. Dolley et al., Defendants. Assignment of Errors. Filed May 16, 1910. Geo. F. Sharitt, Clerk.

96 In the Circuit Court of the United States for the District of Kansas, First Division.

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia; Danville State Bank, of Danville; State Bank of Downs, Downs; Union State Bank, of Downs; Falun State Bank of Falun; Marion County State Bank, of Florence; Ford State Bank, of Ford; Citizens Bank, of Frankfort; Farmers State Bank of Greensburg; Citizens State Bank, of Grenola; Bank of Hamlin, of Hamlin; Farmers & Merchants State Bank, of Harper; Farmers State Bank, of Hazelton; Morrill and James Bank, of Hiawatha; State Bank of Holton, of Holton; State Bank of Home City, of Home City; Bank of Horton; Iuka State Bank, of Iuka; Jamestown State Bank, of Jamestown; State Bank of Jennings, of Jennings; State Bank of Lancaster, of Lancaster; Exchange Bank of Lenora; McPherson Bank, of McPherson; Citizens State Bank of Medicine Lodge; Muscotah State Bank, of Muscotah; Olsburg State Bank, of Olsburg; Peru State Bank, of Peru; First State Bank of Portis; Bank of Powhattan, Powhattan; Peoples Bank of Pratt; Sharon Valley State Bank of Sharon; South Haven Bank, of South Haven; Kendall State Bank of Valley Falls; Security State Bank, of Wellington; Wilmore State Bank, of Wilmore; Farmers State Bank, of Whiting; Willis State Bank, of Willis; Bank of Winchester, of Winchester; Citizens Bank of Hazelton, Complainants,

VS.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

*Petition for Allowance of Appeal.*

97 The complainants, Assaria State Bank of Assaria, Citizens Bank of Axtell, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia, Danville State Bank of Danville, State Bank of Downs, Downs, Union State Bank, of Downs, Falun State Bank of Falun, Marion County State Bank of Florence, Ford State Bank of Ford, Citizens Bank, of Frankfort, Farmers State Bank of Greensburg, Citizens State Bank, of Grenola, Bank of Hamlin, of Hamlin, Farmers & Merchants State Bank of Harper, Farmers State Bank of Hazelton, Morrill and James Bank, of Hiawatha, State Bank of Holton, of Holton, State Bank of Home City, of Home City, Bank of Horton, Iuka State Bank, of Iuka, Jamestown State Bank of Jamestown, State Bank of Jennings, of Jennings, State Bank of Lancaster, of Lancaster, Exchange Bank of Lenora, McPherson Bank of McPherson, Citizens State Bank of

Medicine Lodge, Muscotah State Bank, of Muscotah, Olsburg State Bank, of Olsburg, Peru State Bank of Peru, First State Bank of Portis, Bank of Powhattan, Powhattan, Peoples Bank of Pratt, Sharon Valley State Bank of Sharon, South Haven Bank of South Haven, Kendall State Bank of Valley Falls, Security State Bank of Wellington, Wilmore State Bank of Wilmore, Farmers State Bank of Whiting, Willis State Bank of Willis, Bank of Winchester of Winchester, Citizens Bank of Hazelton, in the above entitled cause, feeling aggrieved by the order and decree of the court, entered on the 24th day of December, 1909, and on the 16th day of May, 1910, in the above entitled cause, pray for an order allowing an appeal from the said orders and decrees to the Supreme Court of the United States, and that an order be made fixing the amount of security which the complainants shall be required to furnish as a cost bond upon said appeal.

CHESTER I. LONG,  
JOHN L. HUNT,  
J. W. GLEED,  
*Solicitors for Complainants.*

B. P. WAGGENER, .  
JOHN L. WEBSTER,  
*Of Counsel.*

98 *Order Allowing Appeal.*

It is ordered that the appeal as prayed by the complainants is hereby allowed to the Supreme Court of the United States to review the orders and decrees heretofore entered in said cause and the amount of the cost bond is hereby fixed at \$500.00.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 8816. In the United States Circuit Court, District of Kansas, First Division. Assaria State Bank et al., Complainants, vs. Joseph N. Dolley et al., Defendants. Petition for Allowance of Appeal. Filed May 16, 1910. Geo. F. Sharitt, clerk.

99 In the Circuit Court of the United States for the District of Kansas, First Division.

ASSARIA STATE BANK OF ASSARIA, CITIZENS BANK OF AXTELL, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia; Danville State Bank, of Danville; State Bank of Downs, Downs Union State Bank, of Downs; Falun State Bank of Falun; Marion County State Bank, of Florence; Ford State Bank, of Ford; Citizens Bank, of Frankfort; Farmers State Bank of Greensburg; Citizens State Bank, of Grenola; Bank of Hamlin, of Hamlin; Farmers & Merchants State Bank, of Harper; Farmers State Bank, of Hazelton; Morrill and Janes Bank, of Hiawatha; State Bank of Holton, of Holton; State Bank of Home City, of Home City; Bank of Horton; Iuka State Bank, of Iuka; Jamestown State Bank, of Jamestown; State Bank of Jennings, of Jennings; State Bank of Lancaster, of Lancaster; Exchange Bank of Lenora; McPherson Bank, of McPherson; Citizens State Bank of Medicine Lodge; Muscotah State Bank, of Muscotah; Olsburg State Bank, of Olsburg; Peru State Bank, of Peru; First State Bank of Portis; Bank of Powhattan, Powhattan; Peoples Bank of Pratt; Sharon Valley State Bank of Sharon; South Haven Bank, of South Haven; Kendall State Bank of Valley Falls; Security State Bank, of Wellington; Wilmore State Bank, of Wilmore; Farmers State Bank, of Whiting; Willis State Bank, of Willis; Bank of Winchester, of Winchester; Citizens Bank of of Hazelton, Complainants,

vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas, Defendants.

*Bond on Appeal.*

Know all men by these presents that we, Assaria State Bank of Assaria, Citizens Bank of Axtell, Baileyville State Bank of Baileyville, First State Bank of Bellaire, Citizens State Bank of Centralia, Citizens State Bank of Cheney, Coats State Bank of Coats, State Bank of Colwich, Cloud County Bank, of Concordia, Danville State Bank of Danville, State Bank of Downs, Downs Union State Bank, of Downs, Falun State Bank, of Falun, Marion County State Bank of Florence, Ford State Bank of Ford, Citizens Bank, of Frankfort, Farmers State Bank of Greensburg, Citizens State Bank, of Grenola, Bank of Hamlin, of Hamlin, Farmers & Merchants State Bank of Harper, Farmers State Bank of Hazelton, Morrill and Janes Bank, of Hiawatha, State Bank of Holton, of Holton, State Bank of Home City, of Home City, Bank of Horton, Iuka State Bank, of Iuka, Jamestown State Bank of Jamestown, State Bank of Jennings, of Jennings, State Bank of Lancaster, of Lancaster, Exchange Bank



of Lenora, McPherson Bank of McPherson, Citizens State Bank of Medicine Lodge, Muscotah State Bank, of Muscotah, Olsburg State Bank, of Olsburg, Peru State Bank of Peru, First State Bank of Portis, Bank of Powhattan, Powhattan, Peoples Bank of Pratt, Sharon Valley State Bank of Sharon, South Haven Bank of South Haven, Kendall State Bank of Valley Falls, Security State Bank of Wellington, Wilmore State Bank of Wilmore, Farmers State Bank of Whiting, Willis State Bank of Willis, Bank of Winchester of Winchester, Citizens Bank of Hazelton, as principals, and E. E. Ames and J. R. Burrow as surety are held and firmly bound unto the defendants Joseph N. Dolley as Bank Commissioner of the State of Kansas, and Mark Tulley as State Treasurer of the State of Kansas, in the sum of Five Hundred Dollars to be paid to the defendants subject to the following conditions:

Whereas the complainants in the above entitled cause have sued out an appeal to the Supreme Court of the United States — reverse the orders and decrees entered in the United States Circuit Court for the District of Kansas, on the 24th day of December, 1909, and on the 16th day of May, 1910.

Now therefore, the condition of this obligation is such that if the said complainants shall prosecute said appeal to effect, and answer all costs if it fails to make said appeal good, then this obligation shall be void, otherwise to remain in full force and effect.

CHESTER I. LONG,  
J. W. GLEED,  
JOHN L. HUNT,  
*Solicitors for Complainant.*  
E. E. AMES.  
J. R. BURROW.

Approved.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 8816. In the Circuit Court of the United States, District of Kansas, First Division. Assaria State Bank of Assaria et al., Complainants, vs. Joseph N. Dolley et al., Defendants. Bond on Appeal. Filed May 16, 1910. Geo. F. Sharitt, clerk.

102 UNITED STATES OF AMERICA,  
*District of Kansas, ss:*

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a full, true and correct copy of the record and proceedings in said court in Case No. 8816 wherein Assaria State Bank of Assaria, et al., are complainants and Joseph N. Dolley as Bank Commissioner of the State of Kansas, et al., are defendants.

I further certify that the original Citation is hereto attached and returned herewith.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 18th day of June, A. D. 1910.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT, *Clerk.*

Endorsed on cover: File No. 22,238. Kansas C. C. U. S. Term No. 617. Assaria State Bank of Assaria, Citizens Bank of Axtell et al., appellants, vs. Joseph N. Dolley, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas. Filed June 23d, 1910. File No. 22,238.

Office Supreme Court, U. S.  
**FILED.**  
OCT 10 1910  
JAMES H. McKENNEY,  
CLERK.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 617

ASSARIA STATE BANK OF ASSARIA,  
CITIZENS BANK OF AXTELL, *et al.*,  
*Appellants,*

VS.

JOSEPH N. DOLLEY, as Bank Commis-  
sioner of the State of Kansas, and  
MARK TULLEY, as state Treasurer  
of the State of Kansas.

Notice of Motion  
to Advance.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF KANSAS.

The appellants hereby give notice to the appellees in the above entitled cause that the said appellants have filed a motion in the Supreme Court of the United States to have the above entitled cause advanced to be argued in conjunction with *Noble State Bank vs. Haskell, et al.*, No. 71, and which motion will be called up for submission to the Supreme Court at the opening of its session in the City of Washington, beginning on October 10, 1910, or as

soon thereafter as the said court will entertain the submission of the same.

JOHN L. WEBSTER,  
B. P. WAGGENER,  
CHESTER I. LONG,  
J. W. GLEED,  
JOHN L. HUNT.

Service of the above notice, together with a copy of the motion to advance, is hereby accepted.

Dated this the 1st day of October, 1910.

FRED S. JACKSON,  
*Attorney General.*

By JOHN MARSHALL,  
*Assistant Attorney General.*

ALEX MITCHELL,  
G. H. BEECKMAN,  
*Attorneys for Appellees.*





OCT 10 1910

JAMES H. McKENNEY

## SUPREME COURT OF THE UNITED STATES.

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ASSARIA STATE BANK OF ASSARIA,  
CITIZENS BANK OF AXTELL, *et al.*,  
*Appellants,*

VS.

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sioner of the State of Kansas, and  
MARK TULLEY, as state Treasurer  
of the State of Kansas.

Motion to Advance.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF KANSAS.

Now comes the appellants in the above entitled cause and move the court to advance this cause and set the same down for argument at the time the case of *Noble State Bank vs. Haskell, et al.*, No. 71, shall come on for hearing.

Said case of *Noble State Bank vs. Haskell, et al.*, No. 71, October Term, 1910, is commonly known as the "Oklahoma Bank Guarantee Case" and involves an Act commonly known as the Oklahoma Bank Guarantee Law. The *Assaria State Bank of Assaria, et al., vs. Joseph N. Dolley, et al.*, involves the constitutionality of a statute of



Kansas commonly known as the "Kansas Bank Guarantee Act." As both cases involve the constitutionality of "Bank Guarantee Laws," the appellants herein deem it expedient that both cases should be argued at one and the same time, and to that end suggest this case be advanced to be heard with the Oklahoma case.

JOHN L. WEBSTER,  
B. P. WAGGENER,  
CHESTER I. LONG,  
J. W. GLEED,  
JOHN L. HUNT.





Office Supreme Court, U. S.  
FILED.

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JAMES H. MCKENNEY,

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 617.

ASSARIA STATE BANK OF ASSARIA, (and 46 other  
Kansas State Banks,) }  
Appellants,

vs. }

JOSEPH N. DOLLEY, as Bank Commissioner of the  
State of Kansas, and MARK TULLEY, as State  
Treasurer of the State of Kansas, }  
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

## BRIEF FOR APPELLANTS.

IN SUPPORT OF THE CONTENTION THAT THE  
KANSAS BANK GUARANTY LAW  
IS UNCONSTITUTIONAL.

CHESTER I. LONG,  
J. W. GLEED,  
JOHN L. HUNT,  
*Solicitors for Appellants.*

JOHN L. WEBSTER,  
B. P. WAGGENER,  
*Of Counsel.*



# In the Supreme Court of the United States,

OCTOBER TERM, 1910.

Assaria State Bank of Assaria, Citizens Bank of Axtell,  
Baileyville State Bank of Baileyville, First State Bank  
of Bellaire, Citizens State Bank of Centralia, Citizens  
State Bank of Cheney, Coats State Bank of Coats,  
State Bank of Colwich, Cloud County Bank, of Con-  
cordia, Danville State Bank, of Danville, State Bank of  
Downs, Downs, Union State Bank, of Downs, Falun  
State Bank, of Falun, Marion County State Bank, of  
Florence, Ford State Bank, of Ford, Citizens Bank, of  
Frankfort, Farmers State Bank, of Greensburg, Citizens  
State Bank, of Grenola, Bank of Hamlin, of Hamlin,  
Farmers & Merchants State Bank, of Harper, Farmers  
State Bank of Hazelton, Morrill and James Bank, of  
Hiawatha, State Bank of Holton, of Holton, State Bank  
of Home City, of Home City, Bank of Horton, Iuka  
State Bank, of Iuka, Jamestown State Bank, of James-  
town, State Bank of Jennings, of Jennings, State Bank  
of Lancaster, of Lancaster, Exchange Bank of Lenora,  
McPherson Bank, of McPherson, Citizens State Bank  
of Medicine Lodge, Muscotah State Bank, of Muscotah,  
Olsburg State Bank, of Olsburg, Peru State Bank, of  
Peru, First State Bank of Portis, Bank of Powhattan,  
Powhattan, Peoples Bank, of Pratt, Sharon Valley  
State Bank, of Sharon, South Haven Bank, of South  
Haven, Kendall State Bank, of Valley Valls, Security  
State Bank, of Wellington, Wilmore State Bank, of  
Wilmore, Farmers State Bank, of Whiting, Willis State  
Bank, of Willis, Bank of Winchester, of Winchester,  
Citizens Bank of Hazelton, *Appellants,*

No. 617.

*vs.*

Joseph N. Dolley as Bank Commissioner of the State of  
Kansas, and Mark Tulley as State Treasurer of the  
State of Kansas, *Appellees.*

*Appeal from the Circuit Court of the United States  
for the District of Kansas—First Division.*

**BRIEF FOR APPELLANTS.**

## STATEMENT.

THE Kansas Legislature of 1909 passed a so-called Bank Guaranty Law, which went into effect June 30, 1909. (Sess. Laws of Kas. 1909, p. 96, Ch. 61; Gen. Stat. Kas. 1909, p. 129.)

On September 14th, 1909, three suits were commenced against the State Bank Commissioner and the State Treasurer, to enjoin them from proceeding under this law, on the ground that the law was unconstitutional. In one of these suits the Assaria State Bank and 46 other State banks were complainants; in another suit the Abilene National Bank and 142 other National banks were complainants; and in the other suit Frank S. Larabee, a dissenting stockholder in a State bank, was complainant. These suits were heard together in the trial court on demurrers to the bills and applications for temporary injunctions. In the suit brought by the State banks the demurrer was sustained and the application for a temporary injunction was denied. (175 Fed. 365), and complainants appealed directly to this court. That suit is No. 617, now before the court.

In the suit brought by the National banks the demurrer was overruled and the application for an injunction was allowed. (175 Fed. 365.) Defendants ap-



pealed to the Circuit Court of Appeals for the Eighth Circuit from the order allowing the injunction, and that order was there reversed. (179 Fed. 461.) The trial court then set aside the order overruling the demurrer, and entered a final decree sustaining the demurrer and dismissing the bill. Complainants then appealed from that decree to this court.

In the *Larabee* case the demurrer was overruled, and the bank in which Larabee was a stockholder was enjoined from participating under the law and the State officers were enjoined from allowing it to participate. (175 Fed. 365.) No appeal was taken by either party in that case.

The one principal issue in the case at bar is, of course, the constitutionality of the Bank Guaranty Law of Kansas. A statement of that law, therefore, together with a statement of the few facts alleged in the bill, will show the issues which were before the court below on the hearing of the demurrer, and which are brought here by this appeal.

#### THE KANSAS BANK GUARANTY LAW.

A copy of the law appears as an exhibit to the bill of complaint. (Rec., p. 19.) A carefully prepared digest of the law appears as an appendix to this brief.

The law in substance is as follows :

Certain classes of banks may apply to the Bank

Commissioner to have their depositors guaranteed, and if after examination the banks are found to comply with the requirements of the law, and upon the payment of assessments or premiums equal to one-twentieth of one per cent of their average deposits eligible to guaranty (less the amount of capital and surplus), and upon deposit "as an evidence of good faith" of bonds to the amount of \$500 for every \$100,000 of average deposits subject to guaranty (less capital and surplus), they receive a certificate from the Bank Commissioner that their depositors are guaranteed.

The banks whose depositors may be guaranteed under the law are :

**A.** Any *incorporated* State bank already doing business in this State,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital ;

**B.** Any bank which may, after the passage of the act, be authorized to do business in this State,

Which shall have been actively engaged in the business of banking for at least one year,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital ;

**C.** Any bank which may, after the passage of the act, be authorized to do business in this State,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital,

Doing business in a town in which all other banks shall have failed to become guaranteed banks within six months after the taking effect of this act,

Whether it has been actively engaged in business for one year or not.

No bank shall participate in the fund which—

Pays interest at a rate greater than 3 per cent per annum on any form of deposit ;

Pays any interest on savings deposits withdrawn before July 1 or January 1 next following date of deposit ; or

Pays interest on any time certificate cashed before maturity.

Existing contracts excepted from above.

Notwithstanding the fact that the certificate granted by the Bank Commissioner recites that its—

*“Depositors are guaranteed by the Bank Depositors’ Guaranty fund of the State of Kansas,”*

the following classes of depositors are not secured :

Depositors who receive any interest on checking accounts.

Depositors receiving more than three per cent interest on time certificates.

Depositors holding time certificates under six months.

Depositors holding time certificates over one year.

Depositors holding time certificates where interest does not cease at maturity.

Depositors with savings accounts of any kind exceeding \$100.

Depositors with savings accounts of any amount if subject to check.

Depositors with savings accounts of any amount whether subject to check or not if not subject to the sixty-day withdrawal clause.

Depositors whose deposits are primarily rediscounts.

Depositors whose deposits are primarily money borrowed by the bank.

Depositors who have any other security than the bank-guaranty law.

During January of each year the Bank Commissioner is required to make assessments of  $\frac{1}{20}$  of 1 per cent of the average guaranteed deposits (less capital and surplus), and when the guaranty fund which is made up of these assessments is depleted he may make additional assessments of like amount not exceeding five assessments in any one year.

When any bank shall be found to be insolvent, the Bank Commissioner—

Shall take charge and wind up its affairs,

Shall issue to each depositor upon proof of claim a certificate bearing 6 per cent interest, except

Where a contract rate exists on the deposit the certificate shall bear the contract rate.

After the officer in charge shall have realized on the assets of the bank and exhausted the liability of its stockholders,

And shall have paid *all funds* so collected in dividends to the *depositors*,

He shall certify all balances due on guaranteed deposits to the Bank Commissioner,

Who shall draw checks on the State Treasurer, payable out of the Guaranty Fund for such balances.

If the Guaranty Fund together with the five authorized assessments shall be insufficient, the depositors shall be paid *pro rata*, and the balance shall be paid when the next assessment shall be available.

The State Printer is required to honor requisitions for the blanks and record books required by the Bank Commissioners and State Treasurer, and the work of administering the law rests upon the Bank Commissioner and State Treasurer and their office forces.

Section 13 of the Act is as follows:

“After the passage of this act any National bank doing business in the State of Kansas, under the laws of the United States, *after an examination at its expense by the State Bank Commissioner*, and upon his approval as to its financial condition, may at its option participate in the assessments and benefits of the bank depositors’ guaranty fund of the State of Kansas *upon the same terms and conditions as apply to State banks: Provided, That* such National bank shall forward to the Bank Commissioner of the State of Kansas detailed reports, in form to be provided by him, of its condition on the dates of the usual called statements of State banks (such report not to be published except at the option of the bank), *and shall submit to one examination each year by his department (or oftener in his discretion) as provided by the banking laws of the*

State of Kansas, and pay the usual fee therefor. Should a National bank disregard or refuse to comply with any recommendation made by the Bank Commissioner, in conformity with the provisions of this act, it shall immediately be subject to the provisions and penalties of this act and its certificate of membership in the bank depositors' guaranty fund shall be canceled."

It is alleged in the bill that the amount in dispute exceeds \$2000, exclusive of interest and costs (Par. II); that 13 of complainant banks have not a surplus equal to 10 per cent of their capital stock (Par. IX); that the effect of the act is to embark the State in the private business or pursuit of conducting a mutual insurance company; that there are more than 700 banks in the State whose depositors are entitled to the benefits of the act; and that the carrying on of this insurance scheme will be a great expense to the State, which expense can only be paid out of money raised by taxation (Par. XIV); that complainant banks and their shareholders are taxpayers (Par. XIV), and that all taxation for the purpose of carrying out this law will be taking property of complainants without due process of law; that the law discriminates against complainant banks and other classes of banks, and between depositors,

and against general creditors of banks as distinguished from depositors; and that—

“The result of the enforcement of said law will be to either drive unguaranteed banks out of business and force them to liquidate and wind up their business, or to force banks which have not become guaranteed to make assessments on their stockholders for the purpose of raising a surplus fund equal to 10 per cent of their capital in case they have no such surplus fund, and to cease to pay more than 3 per cent interest on deposits of any kind, and to relinquish many other valuable rights guaranteed to them by the Constitution and laws of the State of Kansas and of the United States.” (Par. IX.)

#### ASSIGNMENT OF ERRORS.

Appellants aver that there is error in the record and decree herein, as follows:

1. The court below erred in sustaining the demurrer of appellees to appellants' bill.
2. The court below erred in not overruling the demurrer of appellees to appellants' bill.
3. The court below erred in holding that it had no jurisdiction of this suit.
4. The court below erred in holding that because appellants could participate under the law complained of, they could not object to discrimination against them.

5. The court below erred in holding that appellant banks which have not a surplus equal to 10 per cent of their capital, and which may not therefore participate under the law, could not complain of the discrimination against them, because they could remove their disqualification by acquiring a surplus.

6. The court below erred in holding that it had no jurisdiction to enjoin taxation for the purposes of this law.

7. The court below erred in denying the temporary injunction prayed for in appellants' bill of complaint.

8. The court below erred in not holding that Chapter 61, Session Laws of Kansas of 1909, was, as against appellants, in contravention of the Constitution of the United States, and especially the Fourteenth Amendment thereof.

9. The court below erred in not holding that taxation of appellants for the purposes of this law would be in contravention of the Fourteenth Amendment to the Constitution of the United States.

10. The court below erred in dismissing this cause for want of jurisdiction.

11. The court below erred in entering its decree sustaining the demurrer of appellees and dismissing appellants' bill of complaint.



## BRIEF.

## I.

THE LAW IS AN INSURANCE LAW AND NOT A BANKING  
LAW.

The so-called Bank Guaranty Law is not a regulation of either banks or banking. It is a law creating an insurance scheme to be conducted by the State, the expenses of which are to be paid out of moneys raised by general taxation.

*In re Right of National Banks to Participate in  
Kansas Bank Guaranty Law, 27 Op. Atty.-  
Gen. 272.*

The *Insurer* is the State.

The *Fund* for the payment of losses is derived from premiums paid by banks and the fund for the payment of expenses from general taxation. These expenses will largely exceed \$28,000 per year, and will exceed the amount of annual premiums paid by all banks.

Session Laws of Kansas, 1909, pp. 18 and 48.

The *Assured* are the depositors. Nothing in which the banks have any beneficial interest is insured.

The *Risk* is the obligation of the bank to certain depositors.

The *Loss* is the amount of deposits which the assets of the banks and the double liability of their stockholders is insufficient to pay.

The *Premium-payers* are banks (voluntarily) and taxpayers (compulsorily).

## II.

## TAXATION.

Taxation for a private purpose is a taking of property without due process of law.

Brannon, Fourteenth Amendment, p. 160.

*Cole v. LaGrange*, 113 U. S. 1.

*Loan Ass'n v. Topeka*, 20 Wall. 655.

Cooley, Taxation, 67.

*Sharpless v. Mayor*, 59 Am. Dec. 759.

The law is not a police regulation. A statute to compel payment of debts is not a police regulation.

*Gulf Ry. Co. v. Ellis*, 165 U. S. 150.

This law acts by way of gift—by taking the property of one and giving it to another. Police power is simply the enforcement of the maxim, *Sic utere tuo, ut alienum non lædas*, and acts by way of restraint.

Tiedeman, Limitations of Police Power, § 1.

Freund, Police Power, §§ 3, 22, 8.

An exercise of the police power can be justified only by the needs of the public generally. This law benefits only a limited class of bank depositors.

*Lawton v. Steele*, 152 U. S. 133.

*Hume v. Laurel Cemetery*, 142 Fed. 553.

*Colon v. Lusk*, 153 N. Y. 188.

*State v. Redmon*, 134 Wis. 89.

*Fisher v. Woods*, 187 N. Y. 90.

The police power exists only where a necessity for its exercise exists. This law does not depend upon the necessity of those benefitted—the depositors—for its existence, because it may be put in action only by the voluntary act of private banking corporations.

*Larabee v. Dolley*, 175 Fed. 365.

*Tiedeman*, Limitations of Police Power, § 1.

*Freund*, Police Power, §§ 3, 8 and 22.

*Lochner v. New York*, 198 U. S. 45.

*Chicago Ry. Co. v. Drainage Com'rs*, 200 U. S. 561.

*Lawton v. Steele*, 152 U. S. 133.

*Reduction Co. v. Sanitary Works*, 199 U. S. 306.

*Gardner v. Michigan*, 199 U. S. 325.

*Ritchie v. People*, 155 Ill. 98.

*People v. Stede*, 231 Ill. 340.

The law is therefore not an exercise of the police power.—No other public purpose justifies it.

A public purpose is a governmental purpose.

*Dodge v. Mission Twp.*, 107 Fed. 827, 830.

A governmental purpose is one for the accomplishment of which, as shown by history, governments were instituted.

*Loan Ass'n v. Topeka*, 20 Wall. 655.

*Opinion of Justices*, 30 N. E. (Mass.) 1142.

The *Premium-payers* are banks (voluntarily) and taxpayers (compulsorily).

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Governments were not instituted for the purpose of insuring deposits or any other property interests.

Considered as an act for the relief of sufferers from bank failures or as an act to pay the debts of banks, the purpose of the act is private and not public.

*Baltimore Ry. Co. v. Spring*, 89 Md. 510.

*State v. Township of Osawkee*, 14 Kas. 418.

*Lowell v. Boston*, 111 Mass. 454.

*Loan Ass'n v. Topeka*, 20 Wall. 655.

Taxation for the purposes of this law is therefore taxation for private purposes.

This suit will lie. Power to do an act the expense of which can be paid only out of moneys to be raised by taxation, depends upon the power to tax.

*Loan Ass'n v. Topeka*, 20 Wall. 655.

A suit to prevent taxation because the taxation will be a taking of property without due process of law, involves a Federal question.

*Fallbrook District v. Bradley*, 164 U. S. 112.

Section 5148, Gen. Stat. Kas., 1905, provides:

"An injunction may be granted to enjoin . . . any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment; and any number of persons whose property is or may be affected by the tax or assess-

ment so levied or whose burdens as taxpayers may be increased by the threatened unauthorized contract or act, may unite in the petition filed to obtain such injunction."

A suit may be brought on the equity side of the Federal courts under this statute without a showing of irreparable injury or other grounds of equity jurisdiction.

*Cummings v. National Bank*, 101 U. S. 153, 157.

*Humes v. Little Rock*, 138 Fed. 929.

*Williams v. Crabb*, 117 Fed. 193, 197.

*Platt v. Lecocq*, 158 Fed. 723.

*San Francisco Bank v. Dodge*, 197 U. S. 70.

*Village v. Baker*, 172 U. S. 269.

*Crampton v. Zabriskie*, 101 U. S. 601, 609.

*McCulloch v. Brown*, 23 L. R. A. (S. C.) 410.

The bill contains an allegation that the amount in controversy exceeds \$2000, exclusive of interest and costs. This is admitted by the demurrers unless the allegations of fact in the bill show the contrary to a "legal certainty."

*North American Co. v. City*, 151 Fed. 120.

*Barry v. Edmunds*, 116 U. S. 550.

The amount in controversy is the whole expense of administering this law.

*Gibson v. Shufeldt*, 122 U. S. 27.

*Western Tel. Co. v. Norman*, 77 Fed. 13.

*Brown v. Trousedale*, 138 U. S. 389.

*Johnson v. City*, 106 Fed. 763.

*Market Co. v. Hoffman*, 101 U. S. 112.

*Davies v. Corbin*, 112 U. S. 36.

### III.

#### DISCRIMINATION.

It is alleged in the bill that thirteen of complainant banks have not a 10 per cent surplus. The classification under this law is arbitrary and not reasonable as to these banks.

Classification must rest upon some difference which bears a reasonable and just relation to the act in relation to which the classification is proposed.

*Gulf Ry. Co. v. Ellis*, 165 U. S. 150, and cases there cited.

*Atchison Ry. Co. v. Matthews*, 174 U. S. 96.

Power to pass the law arises from the necessity for the law.

*Lawton v. Steele*, 152 U. S. 133, 137.

*State v. Redmon*, 134 Wis. 89.

The act is for the benefit of depositors. Depositors in banks which have no surplus and which are therefore presumably the weaker banks, need the benefits of the law more than depositors in stronger banks. A classification which deprives them of the benefits of the law has an unreasonable, rather than a reasonable relation to the object sought to be accomplished by the law.



The State had no power to pass the law, except in the interest of the public generally.

*Lawton v. Steele*, 152 U. S. 133, 137.

*Hume v. Laurel Cemetery*, 142 Fed. 552.

*Colon v. Lusk*, 153 N. Y. 188.

*State v. Redmon*, 134 Wis. 89.

*Fisher v. Woods*, 187 N. Y. 90.

It is as much in the interest of the public generally that depositors in banks without a 10 per cent surplus should be paid as that depositors in other banks should be paid.

*State v. Goodwill*, 33 W. Va. 179.

Although the act is for the benefit of depositors, they cannot get insurance directly, but only when some bank buys it for them. Banks without a 10 per cent surplus cannot buy insurance for their depositors. Other banks can offer the benefits of the law as a premium to depositors. The depositors are arbitrarily classed in such a way as to favor banks having a surplus and to injure banks having no surplus.

Classification in accordance with the peculiarities of the bank with which the depositor does business and not in accordance with the needs of the depositor is arbitrary.

*State v. Haun*, 61 Kas. 146, 153.

It is alleged in the bill that the effect of this arbitrary classification of depositors will be to deprive banks

having no surplus of their business and force them to liquidate. These allegations are admitted by the demurrer.

- U. S. v. Des Moines Co.*, 142 U. S. 510, 544.
- Denison Co. v. Thomas Co.*, 94 Fed. 651, 654.
- City v. Beckham*, 118 Fed. 399.
- Humes v. City*, 138 Fed. 929.
- Lamson Co. v. Siegel Co.*, 106 Fed. 734.
- State v. Arnold*, 140 Ind. 628.
- American Bank v. Bushey*, 45 Mich. 135.
- Hubbard v. Montgomery Co.*, 59 W. Va. 75.
- Davies v. Hunt*, 37 Ark. 574.
- U. S. v. Williams*, 28 Fed. Cas. 635.
- State v. Kelley*, 71 Kas. 811.

These allegations were not recklessly or improvidently made.

Report of Comptroller of Currency, 1909, pp. 25 to 29, 266 and 257, 22 and 23.

Deprivation of business is deprivation of property.

*Osborn v. U. S. Bank*, 9 Wheat. 738.

The law therefore deprives banks which have not a 10 per cent surplus of property without due process of law.

- Hayes v. Missouri*, 120 U. S. 68.
- Yick Wo v. Hopkins*, 118 U. S. 356.
- Connolly v. Pipe Co.*, 184 U. S. 540.
- Reagan v. Farmers Co.*, 154 U. S. 362.
- Cotting v. Stock Yards*, 183 U. S. 79.
- State v. Goodwill*, 33 W. Va. 179.
- McKinster v. Sager*, 163 Ind. 671.

As to banks which have a 10 per cent surplus, the alternatives offered are to refuse to insure their depositors and thus lose all their business, or to submit themselves to a law which will compel them—

Illegally to use the money invested by their stockholders ;

Illegally to discriminate among their depositors; and

Illegally to discriminate between their depositors and their creditors.

Giving such banks the alternative of either being deprived of their property or of illegally conducting their business, is depriving them of their property without due process of law just as certainly as if they were not given the alternative of illegally conducting their business.

## ARGUMENT.

### I.

THE LAW IS NOT A LAW REGULATING EITHER BANKS OR BANKING—IT IS AN INSURANCE LAW.

The law is not a regulation of either banks or banking ; it is not, as was assumed by the Court of Appeals, (179 Fed. 465), a law “designed to improve banking methods and to maintain the local institutions on a “sound basis” ; it is not a law simply to grant new powers to banks or to change the charters of State

Banks or the laws under which they are incorporated. It is purely and simply a law creating an insurance scheme—a law providing for the payment of losses, not for the prevention of bank failures.

In his brief before the Attorney-General of the United States in the matter of the right of National Banks to participate under this Law, Attorney-General Jackson (John S. Dawson, of counsel) said:

“Considering, therefore, the objections of the Attorney-General in their order, *we find that the Kansas law is purely and simply an insurance law. It authorizes the organization of a mutual insurance association and allows banks to become members thereof. The liability is certain and fixed in annual premiums so long as the bank retains its membership. There is not the slightest element of guaranty in the proposition. The risk or amount of premium is fixed by considering the relation of capital and surplus to the amount of the deposits; and as in all mutual insurance companies the insured is liable only to pay the amount necessary to maintain the reserve and the actual loss, always of course within the limit of the premium prescribed (certificate of membership). Approached from any way the Kansas law presents only insurance based on sound business principles.*” (Pp. 6 and 7.)

In the same brief the Attorney-General says further:

“It does not answer this argument to say, as did the Attorney-General in the Oklahoma case,

that the National bank cannot enter into an insurance business or become a member of an insurance corporation, because under the Kansas law such argument would mean that the bank would be utterly powerless to insure any of its property or the fidelity of any of its officers in any mutual insurance company ; and on this question I beg to incorporate a letter written on this subject by the Honorable Joseph L. Bristow, Senator from Kansas, to the Honorable Comptroller of the Currency, under date of March 24th : 'I have yours of March 23rd. In reply I beg to suggest that if it is unlawful for a National bank to join a *mutual insurance company* to insure its depositors,—for that is what the Kansas law creates,—then it is unlawful, also, I should think, for it to take out insurance on its buildings or fixtures in a mutual insurance company. All mutual insurance is an association for the purpose of protecting its members from loss. A bank may insure its property for twenty years, never have a loss, and all the money it contributes goes to pay for the losses of other people or other banks. The same is true of our Guaranty Deposit Law. The majority of the banks will not fail, just as the majority of banking houses do not burn. The assessments will depend upon the losses from failure the same as mutual assessments of fire and life insurance depend upon the losses by burning and death.' This seems to cover the subject fully. If the bank cannot participate in this class of insurance it cannot legally participate in many of the well-established classes of insurance in many of which the banks pay the pre-

miums from their own assets. . . . We submit that no reason can be perceived in law or business policy why the bank should not be allowed to take out *insurance* against the possibility of loss to its depositors." (Pp. 8, 9, 12.)

In his opinion rendered April 6, 1909, after the hearing at which the brief above quoted from was filed, Attorney-General Wickersham said :

"I am strongly of the opinion that a National bank is without corporate power to expend its moneys for the purpose of providing *insurance* that its depositors shall be paid in full. It may, of course, *insure* its own property against loss or destruction; it may *insure* itself against loss of property through theft or other dishonesty, but the application of its funds for the purpose of securing a collateral guaranty by third parties that it will pay in full its debts to its depositors is, it appears to me, beyond its corporate power. . . .

"But assuming that a National bank has corporate power to enter into a contract and pay a premium to *insure* to its depositors the payment in full of their deposits, the statute under consideration imposes," etc., etc.

In every insurance scheme there must be (a) an insurer with a fund applicable to the payment of losses; (b) an assured; (c) a risk; (d) a loss; and (e) a premium and a premium-payer.

*The Insurer and the Fund.* The insurer is the State.

It fixes the amount of the premium, examines the risk, collects the premium, conserves the fund created by the payment of the premiums, and investigates and pays the losses. None of the banks has anything to do with these matters.

The fund applicable to the conduct of this insurance scheme is derived from two sources—assessment of banks, and general taxation. The assessments provide the fund actually to be used in the payment of losses. Not one cent of this fund may be used to pay the expenses of conducting this insurance scheme.

The expenses of the scheme—the cost of investigating the risks, collecting the premiums, investing and reinvesting the funds, investigating and paying losses, and all other expenses usual to an insurance company—all these expenses are paid by general taxation. The materiality of this fact will clearly appear when it is realized that the law under consideration is not intended to prevent bank failures and has no tendency to prevent such failures. It simply provides for the payment of such debts as are left unpaid after the assets of a defunct bank are exhausted. It differs in no way, on principle, from a law providing for the payment by the State of the bad debts of a grocer or butcher or merchant of any kind.

In the case of an ordinary private insurance company

about one-half in amount of the premiums collected is required to pay the expenses of conducting the business and about one-half to pay losses. It is alleged in the bill of complaint (Par. XIV):

“That the effect of said Bank Guaranty Act is to embark the State in the private business or pursuit of carrying on a mutual insurance company.

“That said act requires the State Printer, at the expense of the State, to print and furnish forms and records to be used in carrying out said law, and requires the Bank Commissioner and his clerks and assistants and the State Treasurer and his clerks and assistants to employ the time for which they are paid by the State in carrying out the said law.

“That there are more than 700 banks in the State of Kansas which are entitled to become guaranteed banks under said law, and that the carrying on of said mutual insurance scheme will be a great expense to the State, which can be paid only by money raised by taxation.”

These allegations are of course admitted by the demurrer to the bill.

*United States v. Des Moines Ry. Co.*, 142 U. S. 510.

That these allegations were not recklessly or improvidently made may be shown by acts of the Kansas Legislature, of which the court must take judicial notice. The Session Laws of Kansas for 1909, pp. 18 and 48,



show that the appropriations for the Bank Commissioner's office for the first biennium of the operation of this law are fifty-six thousand dollars larger than they were for the previous biennium ; or twenty-eight thousand dollars per annum. His office force is augmented by an assistant commissioner and eight examiners. He himself must give much time to the scheme. The Attorney-General must act as his counsel. By Section 15 of the guaranty law itself the State Printer is required to furnish all necessary blanks and record books. The twenty-eight thousand dollars appropriated for each year is, therefore, a very small part of the expense caused to the State by the administration of this law. The \$28,000 per year alone, however, equals the annual assessments, at the rate of 1-20 of one per cent as required by Sec. 3 of the law, on fifty-six million dollars of deposits subject to guaranty. The total amount of individual deposits and time certificates of State banks in 1908, as shown by the Bank Commissioner's report, was less than seventy-five million dollars. As more than one-third of the banks which held these deposits were not eligible to guaranty at all, because they did not have the requisite surplus, and as a great part of the deposits in the remaining banks drew interest or failed to comply with the guaranty law in other ways, and as the capital and surplus of these banks amount-

ing to over seventeen million dollars must be deducted from the amount of deposits subject to assessment, it is doubtful if there will ever be fifty-six million dollars of deposits subject to assessment. By paying the costs of running this insurance scheme, therefore, the State saves the beneficiaries at least half of its cost—the assessments would have to be at least twice as large if the concern were self-supporting. The law makes cheap insurance for a few favored depositors at the expense of the taxpayers.

*The Assured.* The assured are a part of the depositors, whose deposits are not otherwise secured, in incorporated *State* banks which have a paid-up and unimpaired surplus equal to 10 per cent of their capital, and which have been in business more than one year. Here again let us remind the court that the purpose and effect of this law is not to prevent bank failures, but to repay to depositors amounts already lost by the failures of banks. It is undoubtedly to be regretted that depositors should be unable to collect money due them from banks, but it is equally to be regretted that a wholesaler should lose money through the failure of the retailer to whom he has sold goods, or that any creditor should lose money through the failure of his debtor. And there is no more reason why the State should pay one class of debts than another. However

this may be, the depositors and not the banks are the assured. The banks get no insurance either directly or indirectly. After the failure has occurred, and the bank has closed its doors and a receiver has been appointed, and the receiver has distributed all the assets of the bank and has exhausted the double liability of the stockholders and distributed the amounts so raised—after all this the State steps in and pays to certain of the depositors the amounts of their deposits left after the application thereto of the assets of the bank. The depositors and not the banks are therefore the assured.

*The Risk.* The risk is of course the indebtedness of the bank to the depositor. The law does not insure anything in which the banks have a beneficial interest. No bank could be made one cent richer by the payment of the insurance.

*The Loss.* The loss is the amount of the deposit of the depositor which the assets of the bank are, after insolvency, insufficient to pay. The purpose and effect of the law is not to *prevent* these losses, but to *pay* them. The bank sustains no loss which is covered by the insurance and gets no part of the insurance money.

Thus far it must be admitted that the law contains no features of bank or banking regulation. A law pro-

viding a fund to be used in repaying to wholesale merchants amounts lost through the failure of retail merchants would not be a police regulation or any other kind of a regulation of retail merchants.

*The Premium and the Premium-payer.* Under this law the insured—the depositor—is not permitted to pay the premium (unless he is a taxpayer, and in that case he is *compelled* to pay a part of the premium). The bank pays the premium for the depositor's insurance. This is the only possible excuse to be found in the whole law for calling it a regulation of either banks or banking.

## II.

### TAXATION.

It is alleged in the bill of complaint (Par. XIV):

“That the State of Kansas and the Legislature thereof have no power to embark in the private business of insurance or to expend money of the State raised by taxation in carrying on mutual insurance companies, and that all money used in the carrying out of said scheme will be taken from the taxpayers of the State of Kansas without due process of law, and the effect of said act will be to deprive the taxpayers of Kansas of property without due process of law.

“That your orators and their respective shareholders are taxpayers, and have paid large sums of money into the general revenue fund of the

State on account of levies and assessments made against the real estate owned by your orators, and on account of their capital stock, and will be required to continue to make such payments, and that such funds have been and are being paid out by the defendants, and, unless enjoined, will continue to be paid out in connection with the operation and enforcement of said Chapter 61, Laws of 1909."

We have already pointed out that the expense to the State of administering this insurance scheme will be considerable. If this money is spent for a *private purpose* as distinguished from a *governmental purpose*, taxation for that purpose will be a taking of property without due process of law.

In Brannon's Treatise on the Fourteenth Amendment, p. 160, the author says :

"It will appear from authorities above that the State power of taxation is very wide; but wide as this power is, still it is not utterly without limits; *it can be exercised only for public ends. Taxation for any other purpose would take property without due process of law, contrary to the Fourteenth Amendment.* 'The general grant of legislative power in the constitution of a State does not authorize the legislature, in the exercise of either the right of eminent domain or of taxation, to take private property without the owner's consent for any but a public object.

The legislature of Missouri has no constitutional power to authorize a city to issue bonds by way of donation to a private manufacturing corporation.' (*Cole v. LaGrange*, 113 U. S. 1.)

" 'There is no such thing in the theory of our governments, State or National, as unlimited power. The executive, the legislative and the judicial departments are all of limited and defined powers. There are limitations of such powers which arise out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. Among these is the limitation of the right of taxation, that it can only be used in aid of a public object, an object within the purpose for which governments are established. It cannot be used in aid of a private enterprise.' (*Loan Association v. Topeka*, 20 Wall. 655.)

"The last case cited holds, as many others do, that whether exactions from the people are lawful taxation, is ultimately a judicial question for the courts. Such exaction, not lawful taxation, would be a deprivation of property without due process, violative of State constitutions and the Fourteenth Amendment. (*Cooley on Taxation*, 67; *Sharpless v. Mayor*, 59 Am. Dec. 759.)"

*The Law is not a Police Regulation.*

We have already pointed out that the law is not a regulation of banks or banking. It is equally clear

that it is not a proper exercise of the police power for any purpose. It provides simply for the payment of certain classes of debts.

“A mere statute to compel the payment of indebtedness does not come within the scope of police regulation.” *Gulf Ry. Co. v. Ellis*, 165 U. S. 150.

The purpose of the act is not to prevent pauperism. A depositor might be totally unable to care for himself, but if he lost all of his money through the failure of a State bank which did not have a 10 per cent surplus and became a charge upon the public, this law would not help him. Another depositor might be worth millions and lose a hundred dollars through the failure of a State bank which had such a surplus, but if he belonged to a favored class of depositors his deposit would be repaid to him by the State. The act certainly cannot be sustained as a police regulation on the ground that it is intended to prevent pauperism.

The act in its last analysis simply provides for the payment of private debts by the State, in part out of money raised by taxation and in part out of money raised by assessment of banks. That there is no element of police power in this, see—

*State v. Township of Osawkee*, 14 Kas. 418, per Brewer, J.

*Loan Ass'n v. Topeka*, 20 Wall. 655.

*Lowell v. Boston*, 111 Mass. 454.

*Baltimore Ry. Co. v. Spring*, 89 Md. 510.

Quotations from these cases appear, *infra*.

The act does not help the depositor until the bank is absolutely defunct and its assets all distributed. It cannot be said, therefore, that it has a tendency to prevent bank failures. It was contended in the court below that the act would have a tendency to prevent runs on banks because the depositors would be assured of getting their money in the end, and that therefore the act could be sustained as a police regulation. We submit, however, that the possibility of ultimately getting deposits paid after the slow process of winding up the affairs of the bank through a receivership would not prevent runs, and that even the prevention of runs would not justify the payment of private debts by the State.

It is true that the act provides for the inspection of banks by the State, but this is a mere incident to the insurance feature. Such inspections can as well be had, and were had before the enactment of the law, without the insurance feature.

Finally, the law is remedial and not preventive—it acts by way of gift and not by way of restraint or compulsion. This clearly shows that it involves the exercise of no part of the police power of the State.



In Tiedeman, Limitations of Police Power, page 4, section 1, the author says:

"In the present connection, as may be gathered from the American definitions heretofore given, the term [police power] must be confined to the imposition of *restraints and burdens* upon persons and property."

In Freund on Police Power, section 3, the author says:

"From the mass of decisions in which the nature of the power has been discussed and its application either conceded or denied, it is possible to evolve at least two main attributes or characteristics which differentiate the police power: It aims directly to promote and secure the public welfare, and it does so by *restraint and compulsion*."

In section 22 of the same work it is said:

"The police power *restrains and regulates* for the promotion of the public welfare the natural or common liberty of the citizen in the use of his personal faculties and of his property."

The police power proper is in essence an extension of the doctrine, "*Sic utere tuo, ut alienum non ledas*." It means, Restrict the use of your property; not, Give your property to another.

"It is to be observed, therefore, that the police power of the government, as understood in the

constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common law as well as the civil-law maxim, *Sic utere tuo, ut alienum non lædas*.

Tiedeman, Limitations on Police Power, § 1.

Freund (Police Power, § 8) says further :

“Thus most of the self-evident limitations upon liberty and property in the interest of peace, safety, health, order and morals are punishable at common law as nuisances. It is with reference to these obvious restraints that the maxim has been proclaimed : *Sic utere tuo, ut alienum non lædas*.

“But no community confines its care of the public welfare to the enforcement of the principles of the common law. The State places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds ; and it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common-law rights, through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of State control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskilful, careless or unscrupulous.”

In *Lawton v. Steele*, 152 U. S. 133, this court, referring to the police power, said :

“To justify the State in thus interposing its authority in behalf of the public *it must appear, first, that the interests of the public generally as distinguished from those of a particular class require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals.*”

See also—

*Hume v. Laurel Hill Cemetery*, 142 Fed. 552, 565.

*Colon v. Lusk*, 153 N. Y. 188, 196.

*State v. Redmon*, 134 Wis. 89.

*Fisher v. Woods*, 187 N. Y. 90, 94.

The *prevention* of bank failures may fairly be said to be required by the interests of the public at large, but the payment of private debts due to a limited class of creditors is clearly demanded only by the interests of those creditors and in no wise benefits the public.

Moreover, the police power exists only where a reasonable necessity for its exercise in the interests of the public at large exists. It is the law of necessity. Here, the benefits of the law are conferred upon a limited class of depositors only. Their right to the benefits depends upon the voluntary action of banks. A law which can be put into action only by the voluntary action of

private corporations which are not benefitted by the law cannot be said to be the law of necessity.

On this point the trial court said (175 Fed. 365) :

“ . . . One thing is clear : the act being permissive only, and not compulsory, and depending on its acceptance by the person to be bound thereby, and not alone on the law-making will, the source of its authority may not be traced to the exercise of the police power of the State. For, the police power of the State is a power resorted to of necessity in the protection and promotion of the health, comfort, safety and welfare of society. Being a law of force and necessity, of restraints and prohibitions, it may not be by the State committed to the judgment of the citizen to determine whether he will or will not be bound by its exercise. (Tiedeman, Limitations of Police Powers, § 1; Freund on Police Power, §§ 3, 8 and 22; *Lochner v. New York*, 198 U. S. 45; *C. B. & Q. Railway v. Drainage Comm's*, 200 U. S. 561; *Lawton v. Steele*, 152 U. S. 133; *Reduction Company v. Sanitary Works*, 199 U. S. 306; *Gardner v. Michigan*, 199 U. S. 325; *Ritchie v. People*, 155 Ill. 98; *People v. Steele*, 231 Ill. 340.)”

*The Purpose Intended by the Act is a Private and not a Public Purpose.*

“A public purpose is a governmental purpose, one of the purposes for which governments are instituted and maintained among men.”

*Dodge v. Mission Twp.*, 107 Fed. (C. C. A., 8th Cir.) 827, 830.

What is or is not a public or governmental purpose is largely a question of history. The question is, Was the purpose one for the accomplishment of which governments were formed? If it was, then it is a public or governmental purpose; if not, it is not.

In *Loan Ass'n v. Topeka*, 20 Wall. 655, the court said :

"In deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of right-ful taxation."

In *Opinion of Justices*, 30 N. E. (Mass.) 1142, 1144, the justices said :

"Constitutional questions concerning the power of taxation, necessarily, are largely historical questions. The constitution must be interpreted, as any other instrument, with reference to the circumstances under which it was framed and adopted. It is not thought necessary to show that the men who framed it or adopted it had in mind

everything which by construction may be found in it, but some regard must be had to the modes of thought and action on political subjects then prevailing; to the discussion upon the nature of the government to be established; to the meaning of the language used, as then understood; and to the grounds on which the adoption or rejection of the constitution was advocated before the people. We know of nothing in the history of the adoption of the constitution that gives any countenance to the theory that the buying and selling of such articles as coal and wood for the use of the inhabitants was regarded at that time as one of the ordinary functions of the government which was to be established. There are nowhere in the constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as at the time when the constitution was adopted was usually bought and sold by individuals, and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The object of the constitution was to protect individuals in their rights to carry on the customary business of life, rather than to authorize the commonwealth or the 'towns, parishes, precincts, and other bodies politic,' to undertake what had usually been left to the private enterprise of individuals."

Eliminate from the act in question the provision giving banks authority to pay the premium for the

insurance of their own obligations to their depositors, and all that directly affects banking has been eliminated. The act does not provide that banks shall not pay more than 3 per cent interest on deposits. It provides only that deposits in such banks may not be insured. It does not provide that every bank shall have a 10 per cent surplus, but provides simply that deposits in such banks are risks which may not be insured in this scheme. It does not provide that banks must be inspected, but provides that when a bank seeks to insure its own debts the risk must be examined, and that when it fails to pay its assessments the risk shall be again examined. Now admitting that the State may directly forbid banks to pay more than 3 per cent interest or to do business without a 10 per cent surplus and that it may inspect banks, it cannot justify a voluntary insurance scheme carried on at public expense on the ground that as a part of that scheme these things are forbidden or required. It is clear, therefore, that the act puts the State in the insurance business. It is equally clear that the insurance business is not one of the purposes for the accomplishment of which governments were instituted.

The purpose to be accomplished through this insurance scheme is to pay private debts due to private

individuals from private corporations. This is not a public purpose.

*Baltimore & Eastern Shore R. Co. v. Spring*, 89 Md. 510, 27 L. R. A. 72, involved the constitutionality of a statute authorizing county bonds to be issued for the benefit of an insolvent railroad company upon the condition that claims against the railroad, held by *bona fide* residents of the county, should be first paid. The court held that the purpose of the act was to pay to the inhabitants of the county the indebtedness due them by the insolvent railroad; that this was a private purpose for which taxes could not be laid, and that therefore the issue of the bonds might be enjoined, as is shown by the following, quoted from pages 73 and 74 of the L. R. A. :

“The purpose of this act was not to aid in the construction of the road, because the road was then completed; nor even to pay debts incurred in the construction, for the beneficiaries of the act were all those who being residents of Talbot county held ‘proper and legal claims’ against the company, and this included all claims whether incurred by the company in constructing the road or otherwise. That the subscription was to be made to enable the county to discharge an obligation imposed upon it by the requirements of good faith, was, as we have seen, founded upon an assumption, and absolutely false. The conclusion seems to be inevitable that the effect and



scope of the act is simply to levy a tax upon the property of the citizens of Talbot county, to pay to certain residents of that county the claims due to them by an insolvent railway company. This is a private purpose, and not one of the objects of taxation. By the Declaration of Rights, article 15, as well as by the fundamental maxims of a free government, taxes can only be imposed to raise money for public purposes. 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.' Cooley Const. Lim. 479. If it be necessary to cite authorities to maintain this thoroughly established principle the following may be mentioned: *Citizens Sav. & Loan Assn. of Cleveland, Ohio, v. Topeka*, 87 U. S. 20 Wall. 655, 22 L. ed. 455; *Cole v. LaGrange*, 113 U. S. 1, 28 L. ed. 896; Cooley Const. Lim. (488), and authorities there cited; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Sharpless v. Philadelphia*, 21 Pa. 168; 59 Wis. 652; 88 Am. Dec. 711; *St. Mary's Industrial School v. Brown*, 45 Md. 337."

Even considered as an act for the relief of sufferers from bank failures, the purpose of the act would be private and not public.

In *State v. Township of Osawkee*, 14 Kas. 481, the act under consideration provided for the loan of public money to grasshopper sufferers for the purpose of buying seed grain. In that case Mr. Justice BREWER said:

"The relief of the poor, the care of those who

are unable to care for themselves, is among the unquestioned objects of public duty. In obedience to the impulses of common humanity, it is everywhere so recognized. Our own Constitution but gives utterance to the universal voice when it says: 'The respective counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon sympathy and aid of society.' (Article 7, Sec. 4.) It must be borne in mind, however, that the term 'poor' is used in two senses.' We use it in one sense simply as opposed to the term 'rich.' Thus we speak of the ordinary laborers, mechanics and artisans as poor people, without a thought of describing persons who are other than self-supporting. Indeed, the large majority of our people are poor people, and yet they would feel insulted to be told that they are objects of public charity. We use the term also to describe that class who are entirely destitute and helpless, and therefore dependent upon public charity. The dictionaries recognize this two-fold sense. Thus, Webster gives these definitions: '1. Destitute of property; wanting in material, riches, or goods; needy, indigent. It is often synonymous with "indigent," and with "necessitous," denoting extreme want. It is also applied to persons who are not entirely destitute of property, but who are not rich; as, a poor man or woman; poor people. 2. (Law.) So completely destitute of property as to be entitled to maintenance from the public.' Now, when we

speak of the relief of the poor as a public duty, and one which may justify taxation, we use the term only in the latter sense. We have no thought of asserting that because a man is not rich, or even because he has nothing but the proceeds of his daily labor, therefore taxation may be upheld in his behalf. Such taxation would be simply an attempt on the part of the State to equalize the property of its citizens. Something more than 'poverty,' in that sense of the term, is essential to charge the State with the duty of support. It is, strictly speaking, the pauper, and not the poor man, who has claims on public charity. It is not one who is in want merely, but one who being in want, is unable to prevent or remove such want. There is the idea of helplessness as well as of destitution. We speak of those whom society must aid, as the dependent classes, not simply because they do depend on society, but because they cannot do otherwise than thus depend. Cold and harsh as the statement may seem, it is nevertheless true, that the obligation of the State to help is limited to those who are *unable* to help themselves. It matters not through what the inability arises—whether from age, physical infirmity, or other misfortune,—it is enough that it exists. It is doubtless true, that in the actual administration of the poor-laws, many who are not properly entitled thereto receive public support; but failures in the administration of laws do not change the principles upon which they must rest. It is important to bear this distinction in mind, for, as will appear here-

after, it is really the former, and not the latter class which is sought to be relieved under this law. . . .

"The purpose of the act, as expressed in the section quoted, is to provide the destitute with provisions, and with grain for seed and feed. This legislation must be construed in the light of known facts. For reasons unnecessary to recount, in some portions of the State last season there was a total, and in others a partial, failure of the crops. It was generally understood that many farmers would come to this spring's sowing with little or no seed, and with stock weakened for lack of grain. To make good this lack is the evident purpose of the act,—to provide grain for seed and feed. Its aim is not to furnish food to the hungry, clothing to the naked, or fuel to those suffering from cold. It is not the helpless and dependent whose wants are alone sought to be relieved. If it were, the fact that many who are neither helpless nor dependent might obtain assistance through its administration, would be no valid objection to the constitutionality of the law. It contemplates a class who have fields to till and stock to care for, and purposes to help them with seed for their fields and grain for their stock, that thus they may pursue with better prospects of success their ordinary avocations. It taxes the whole community to assist one class, and that, not for the purpose of relieving actual want, but to assist them in their regular occupations. These people are engaged in the business of farming. This business cannot be success-

fully carried on without seed, nor without stock strong enough to do the ordinary work. They are destitute of seed, and their stock require grain. Hence the tax upon the community. The principle would be the same if their supply of grain was sufficient, but, through the prevalence of the epizooty, or some other disease, their stock had all died. Could a tax be sustained to purchase stock for their ordinary farm work? Or, again suppose some prairie-fire, driven by a fearful wind, sweeps through a county, consuming its fences and farming tools: can a tax be sustained to supply this loss, and enable the farmers to prosecute their labors? Nor need the inquiry be limited to a single class. Were the carpenters or shoemakers, or any other industrial class, located in a separate quarter of a city, and their tools and stock in trade swept away by fire, could a tax be sustained to purchase new sets of tools, and new stock in trade, to enable them to re prosecute their business and secure support for themselves and families? No distinction in principle can be made between these different supposed cases and the case at bar. They all rest upon this proposition: that a tax is laid upon the public to furnish to one class the means of carrying on its regular occupation. A further examination of this act will but strengthen the views herein expressed. The four succeeding sections are as follows. . . .

“These various provisions show that the idea of the legislature was not the relief of the helpless and dependent, but the assistance of a class tem-

porarily embarrassed. The recipient is required to make oath that he is buying the aid for himself, and not on a speculation. He is to give a note for the amount received, and if a married man, the note must also be signed by his wife. The note is to bear the same date, and draw the same interest, as the bonds, and the interest is payable at the same time as the interest on them. This note is to be a mortgage as well, and the most sweeping kind of a mortgage too, embracing all the real and personal property of the maker, whether owned at the time of its execution or subsequently acquired. And, finally, it is made the express duty of the township treasurer to see to the collection of this note, and to take all proper and needful action therefor. Nothing is contemplated but a loan, and a secured loan at that. The credit of the township is invoked to procure funds for the accommodation of a single class temporarily, and through unexpected calamity, embarrassed in the prosecution of its ordinary business. *Can this be called a public purpose? Clearly not.* It would doubtless relieve the temporary wants of that class, would enable it to enter upon the business of the year with increased hope, and a reasonable expectation of ordinary success in that business, and thus indirectly result in great benefit to the general public. But a similar result would follow the success and prosperity of any other class in business. And if the principle be once recognized in its application to this class, who can tell how soon it may be invoked in aid of another? If one hundred farmers may receive seventy-five dollars each to assist them

in their farming, why may not one hundred mechanics with equal propriety receive seventy-five dollars each to assist them in their business? or a single manufacturer, who employs one hundred hands, receive seventy-five hundred dollars to assist him in his manufacturing? A difference in amount makes no difference in the principle."

There is no difference in principle between giving money to sufferers from crop failures and giving money to sufferers from bank failures.

In *Lowell v. Boston*, 111 Mass. 454, the statute under consideration provided aid for the sufferers from the Boston fire in 1872. In that case the court said:

*"An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thrifless their unemployed capital and entrust it to others who will use it to better advantage for the interests of the com-*

*munity. But it needs no argument to show that an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation."*

In *Loan Ass'n v. Topeka*, 20 Wall. 655, 665, the statute under consideration provided for municipal aid to a private manufacturing corporation. In that case the court said :

"But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

Under these authorities there can be no doubt that if the State provided the fund that was to be paid over to losing depositors the act would be unconstitutional, because the public fund would be paid out for a private



purpose. The use of State money for the purpose of administering this fund and making the examinations of banks called for by the act—for carrying on this insurance company—is just as much the use of public funds for a private purpose.

Taxation to pay private debts cannot, therefore, be called taxation for a public purpose. It follows that taxation for the purpose of raising money to carry on an insurance company is not taxation for a public purpose.

*This Suit will Lie to Prevent Taxation for a Private Purpose.*

Since taxation for a private purpose is a taking of property without due process of law, this suit in its taxation aspect falls directly under the 14th Amendment, and there is therefore involved in this suit a Federal question which fixes the jurisdiction of this court.

*Fallbrook District v. Bradley*, 164 U. S. 112.

But this suit is brought not alone to prevent such taxation, but also to prevent such use of public funds for private purposes as will result in such taxation.

“The proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in the future, not limited to payments from some other source, imply an obligation to pay by

taxation. . . . The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose."

*Loan Ass'n v. Topeka*, 20 Wall, 655, 659.

We say, therefore, that the validity of a law that can be carried out only by a resort to taxation depends upon the power of the State to tax for that purpose.

This case does not fall within the doctrine of such cases as *McCain v. City*, 174 U. S. 168, and *Owensboro Water Works Co. v. City*, 200 U. S. 38, as seems to have been assumed by the trial court. In the McCain case the City, in a method which it was claimed was contrary to the constitution of the State, attempted to annex territory and to tax the territory annexed. It was contended that because the annexation was contrary to the constitution of the State, the taxation was void, and that void taxation was a taking of property without due process of law. The court held, however, that the question was the validity of the annexation under the State laws, and that this was not a Federal question; the court saying:

"It is therefore quite plain that the complainants base their case upon the allegation that their property is about to be taken from them by the City authorities without due process of law, and in violation of the Constitution of the United States, because the act of 1890

violates the Constitution of Iowa. That is a question of law, depending for its solution upon the law of Iowa, and as to what that law is the Federal courts are bound in such a case as this by the decision of the State tribunal. There is no construction of the Federal Constitution involved in that inquiry, nor any question as to its effect upon the complainants' rights in this suit. The question whether their property is taken without due process of law must be decided with sole reference to the law of Iowa."

In *Owensboro Water Works Co. v. City*, 200 U. S. 38, *supra*, the City was authorized to raise \$200,000 by the issue of bonds for the purpose of constructing water-works, but by manipulation of the bonds proposed to raise \$244,000. The bonds could be paid only by taxation. It was contended, as in the case last referred to, that because the manipulation of the bonds was contrary to the laws and constitution of the State, taxation for the purpose of paying the bonds would be a taking of property without due process of law. In that case the court said :

"It is not contended that the legislative enactments by the authority of which the city intends to establish and maintain a system of water-works are inconsistent either with the constitution of Kentucky or the Constitution of the United States. The plaintiff, however, complains that the defendant City has not properly discharged its duties under the laws of the State. For the purposes of the present discussion, let this be

taken as true; still, maladministration of its local affairs by a city's constituted authorities cannot rightfully concern the national government unless it involves the infringement of some Federal right. . . .

"As between citizens of the same State the Federal court may not interfere to compel municipal corporations or other like State instrumentalities to keep within the limits of the power conferred upon them by the State, unless such interference is necessary for the protection of a Federal right."

In the case at bar it is not contended that the expenditure of money for the purposes of this act or that taxation for the purpose of raising such money will be contrary to the State laws only. It is contended that expenditure of money for the purposes of this law is expenditure of money for a private purpose only, and that taxation for the purpose of raising such money is a taking of property for a private purpose and therefore a taking of property without due process of law, contrary to the Fourteenth Amendment.

In the cases cited there was a taking of property for a public purpose but contrary to a State law, and therefore the only question involved arose under the State law. In the case at bar there is a taking of property for a private purpose, and therefore contrary to the Fourteenth Amendment, and the only question involved arises under the Fourteenth Amendment.

Sec. 5148, Gen. Stat. of Kansas 1905, is as follows:

"An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same *or to enjoin any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge or assessment*; and any number of persons whose property is or may be affected by the tax or assessment so levied or whose burdens as taxpayers may be increased by the threatened unauthorized contract, or act, may unite in the petition filed to obtain such injunction."

Suits may be brought under this section in the Federal courts. In *Cummings v. National Bank*, 101 U. S. 153, 157, the Supreme Court said of a similar statute:

"But the statute of the State expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. And though we have repeatedly decided in this court that the statute of a State cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that where a statute of a State created a new right or provided a new remedy the Federal courts will enforce that right either on the common-law or equity side of its docket as the nature of the new right or new

remedy requires. *Van Norden v. Morton*, 99 U. S. 378. Here there can be no doubt that the remedy by injunction against an illegal tax expressly granted by the statute is to be enforced and can only be appropriately enforced on the equity side of the court."

These remarks of the court were in answer to the suggestion "That since there is a plain, adequate and complete remedy by paying the money under protest and suing at law to recover it back, there can be no equitable jurisdiction of the case."

See also *Humes v. Little Rock*, 138 Fed. 929, 933.

In *Williams v. Crabb*, 117 Fed. 193, 197, the Circuit Court of Appeals for the Seventh Circuit said :

"It is well settled that rights and remedies, legal or equitable, provided by the statutes of the States to be pursued in the State courts may be enforced and administered in the Federal courts, and that the terms 'law' and 'equity' as used in the constitution, although intended to mark a distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by the statutes of the States, but new forms of remedies to be administered in the courts of the United States according to the nature of the case. A State cannot, by its Legislature, confer a substan-

tive right or remedy in the way of a suit *inter partes*, upon its own citizens that will not be available to the citizens of the other States; nor can it by any device restrict such right or remedy thus made available, to enforcement in its own courts, the conditions of citizenship being such that they would otherwise be enforceable in the Federal courts. By any other view it would be in the power of a State by legislation to deprive citizens of other States either of the new right or *remedy* given by the State statute or of the forum granted by the Federal Constitution and laws. The citizen of another State cannot be compelled to make such election or to accept a *remedy* upon condition that he forego the constitutional forum to which he would otherwise be entitled."

In *Platt v. Lecocq*, 158 Fed. 723, 727, Judge SANBORN, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"Rights created and remedies provided by the statute of a State to be pursued in the State courts may be enforced and administered in the National courts either at law or in equity as the nature of the rights and remedies may require. 'A party by going into a National court does not lose *any right or appropriate remedy* of which he might avail himself of the State courts in the same locality.' *Davis v. Gray*, 16 Wall. 202, 221; *Darragh v. Wetter Mnf. Co.*, 78 Fed. 7; *National Surety Co. v. State Bank*, 120 Fed. 593, 603; *Barber Asphalt Co. v. Morris*, 132 Fed. 945, 949. The court below,

therefore, in the hearing of this case and this court upon this appeal stand in the place of the Circuit Court of the State, and have plenary power under the statute of South Dakota to determine the original question of the reasonableness of the rules and practice of the Express Company and 'to do justice in the premises.' "

The statute there referred to was, as will be seen by the report of the case below (150 Fed. 391, 399), a statute which provided that if any common carrier should refuse or neglect to obey any lawful order of the Board of Railroad Commissioners, application might be made in a summary way to any court in any country through which the lines of the carrier passed, alleging such violation or disobedience, and that the court should have power to hear and determine the matter and "enforce its judgment by writ of injunction or other proper process, mandatory or otherwise." Under that statute there is no semblance of a showing of irreparable injury or other fact necessary to equitable jurisdiction.

In *San Francisco National Bank v. Dodge*, 197 U. S. 70, 25 S. C. R. 384, Mr. Justice WHITE in delivering the opinion of the court said :

"The appellant bank sued to restrain the enforcement of State, county and city taxes, levied for the year 1900, upon shares of stock of the bank.



Adequate averments were made to show equitable jurisdiction. *Cummings v. Merchants National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903, 904; *Hills v. National Albany Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Lander v. Mercantile Nat. Bank*, 186 U. S. 458, 46 L. Ed. 1247, 22 Sup. Ct. Rep. 908. The taxes were alleged to be in conflict with the law of the United States, Rev. Stat. 5219, U. S. Comp. Stat. 1901, p. 3502."

Mr. Justice BREWER, with whom concurred the Chief Justice, Mr. Justice BROWN and Mr. Justice PECKHAM, in a dissenting opinion said :

"This is an equitable suit brought in the United States court, where the distinction between law and equity is constantly enforced. . . . There are two propositions which have entered into the the jurisprudence of this court so thoroughly that they may be regarded as settled law : First, that equity will not interfere where there is a plain, adequate and complete remedy at law ; and second, that injunction will not issue to restrain the collection of a tax simply on the ground of its illegality. The first is not only the rule of the Court of Chancery in England, but it is the command of the federal statute.

"Sec. 723 Revised Statutes reads :

" 'Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' "

"This defense was pleaded by the defendant in his answer. . . .

“But it may be said that in the following cases this court has laid down an apparently different rule in respect to the taxation of national bank shares: *N. Y. v. Weaver*, 100 U. S. 539; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143; *Cummings v. Mer. Nat. Bank*, 101 U. S. 153; *Hills v. National Albany Exchange Bank*, 105 U. S. 319; *Evansville National Bank v. Britton*, 105 U. S. 322; *Lander v. Mercantile National Bank*, 186 U. S. 458. . . . In *Cummings v. Merchants' Nat. Bank*, *Pelton v. Commercial Nat. Bank* being decided on its authority, the right to an injunction was asserted. The case came from the Circuit Court of the United States for the northern district of Ohio, in which district the bank was located. In delivering the opinion of the court Mr. Justice Miller said, 'on page 157:

“ ‘*But the statute of the State expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Section 5848 of the Revised Statutes of Ohio, 1880; vol. 53, Laws of Ohio, 178, Secs. 1, 2. And though we have repeatedly decided in this court that the statute of a State cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, where a statute of a State created a new right or provided a new remedy, the Federal courts will enforce that right, either on the common-law or equity side of its docket, as the nature of the new right or new remedy requires. Van Norden v. Morton*, 99 U. S. 378, 25 L. Ed. 453. Here there can be no doubt that the remedy by injunction

against an illegal tax, expressly granted by the statute, is to be enforced and can only be appropriately enforced on the equity side of the court.

“ ‘The statute also answers another objection made to the relief sought in this suit, *namely, that equity will not enjoin the collection of a tax except under some of the well-known heads of equity jurisdiction*, among which is not a mere over-valuation, or the illegality of the tax, or in any case where there is an adequate remedy at law. The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases.

“ ‘Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is *designed to operate unequally and to violate a fundamental principle of the Constitution*, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power.’

“ ‘Two reasons are here stated to justify the exception to the ordinary rule in respect to injunctive relief. First, a State statute, and, second, a design on the part of the State authorities to discriminate. There is no statute of California making such special provision in reference to injunctions, and that reason for a de-

parture from the general rule may be put one side."

The italics are the court's.

In *Village of Norwood v. Baker*, 172 U. S. 269, 19 S. C. R. 187, the case of *Cummings v. Bank* is quoted from and approved, and the statute applied in that case is again applied by the court.

In *Crampton v. Zabriskie*, 101 U. S. 601, 609, the court said :

"Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong when the officers of those corporations assume in excess of their powers, to create burdens upon property holders. *Certainly in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county there would seem to be no substantial reason*

*why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers."*

While what is said there is with reference to municipal corporations, we see no reason why, where a State statute expressly permits it, the same doctrine should not apply to the acts of State officers.

*M'Culloch v. Brown*, 23 L. R. A. (S. C.) 410.

*The Amount in Controversy Under the Taxation Theory.*

It is alleged in the bill of complaint that the matter in dispute exceeds the sum of \$2000, exclusive of interest and costs. (Par. II.) This allegation is admitted by the demurrer to the bill (*North American Co. v. City*, 151 Fed. 120; *Barry v. Edmunds*, 116 U. S. 550), and there can therefore be no question as to the jurisdiction of the court so far as the amount in dispute is concerned.

Moreover, this suit is not brought to restrain so much of the taxes only as will be levied upon each of complainant banks. It is brought under the State statute quoted, *supra*, to enjoin public officers from doing acts not authorized by law which will result in the creation of a public burden or the levy of an illegal tax. The amount in controversy under this statute must be the whole amount to be expended

in the carrying out of the provisions of the law in controversy.

In *Gibson v. Shufeldt*, 122 U. S. 27, 33, 38, the court in considering this proposition said :

“In equity, as in admiralty, when the sum sued for is one in which the plaintiffs have a joint and common interest, and the defendant has nothing to do with its distribution among them, the whole sum sued for is the test of the jurisdiction.

“The earliest case of that class is *Shields v. Thomas*, 17 How. 3, in which this court held that an appeal would lie from a decree in equity, ordering a defendant, who had converted to his own use property of an intestate, to pay to the plaintiffs, distributees of the estate, a sum of money exceeding \$2000, and apportioning it among them in shares less than that sum. The case was distinguished from those of *Oliver v. Alexander* and *Rich. v. Lambert*, above cited, upon the following grounds :

“ ‘The matter in controversy,’ said Chief Justice Taney, ‘was the sum due to the representatives of the deceased collectively ; and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim ; and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point ; and if there was any difficulty as to the propor-

tions in which they were to share, the dispute was among themselves, and not with him.

“ ‘It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds two thousand dollars, an appeal would clearly lie to this court, although the interest of each individual was less than that sum.’

“To the same class belongs *Freeman v. Dawson*, 110 U. S. 264, in which the only matter in dispute was the legal title to the whole of a fund of more than \$5,000, as between a judgment creditor and the grantee in a deed of trust. No question arose of payment to or distribution among the *cestuis que trust*, and this court therefore took jurisdiction of an appeal by the trustee from a decree in favor of the judgment creditor.

“In *Market Co. v. Hoffman*, 101 U. S. 112, in which, upon the bill of a number of occupiers of stalls in a market, a perpetual injunction was granted to restrain the market company from selling the stalls by auction, the reason assigned by this court for entertaining the appeal of the company was that ‘the case is one of two hundred and six complainants suing jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable.’ . . . In the less frequent instances in which similar questions have arisen in

proceedings at common law, the same distinctions have been maintained.

"Where a writ of mandamus was issued to compel a county clerk to extend upon a tax collector's books a sum sufficient to pay several distinct judgments held by different persons, it was held that the case was like *Seaver v. Bigelow* and *Schwed v. Smith*, above cited, and the defendant's right of appeal was determined by the amount of each judgment. *Hawley v. Fairbanks*, 108 U. S. 543. But where the writ commanded a collector to collect a tax of one per cent upon the property of a county, which had already been levied for the joint benefit of all the relators, it was held that the case was like *Shields v. Thomas* and *The Connemara*, above cited, and that the right of appeal depended upon the whole amount of the tax. *Davies v. Corbin*, 112 U. S. 36."

So we say in this case that the value of the matter in dispute is the whole amount of illegal taxation and not the separate parts into which that taxation may ultimately be divided. The proceeding is not one by each taxpayer separately to enjoin the divisible part of the tax to which he may ultimately be subjected, but is to enjoin the whole proceeding which will impose the burden of extra taxation, and their interests in this are joint.

The same rule is illustrated in the cases of *Western Union Telegraph Company v. Norman*, 77 Fed. 13, and



*Fishback v. Telegraph Co.*, 161 U. S. 96, 16 S. C. R. 506.

In the case first above referred to the Telegraph Company brought an action to enjoin a State auditor from certifying to the various county clerks the proportions of an alleged illegal tax to be collected in their several counties. The total amount of the tax exceeded the jurisdictional amount, but the proportion which would be certified to each county did not equal the jurisdictional amount. In that case the court said :

“The aggregate of these local taxes is thus shown to be over \$2000, exclusive of interest and costs. The case we think is not within the principle of *Fishback v. Telegraph Company*, 16 S. C. R. 506, and the previous case of *Walter v. Railroad Company*, 147 U. S. 370. In both these cases it was sought to enjoin the collection of local taxes which had been assessed and levied by the respective counties and municipalities. Hence, the local taxes had been distinctly separated so that a separate action could have been maintained against counties and municipalities if the taxes had been paid under protest. Here it is sought to prevent the auditor from completing the appraisement and levy of taxes which if completed without legal authority would be a wrongful act, and one probably subjecting him to an action by the party injured thereby. However this may be, the amount of tax in controversy between the plaintiff and the defendant for the benefit of the State of Kentucky is over \$2000, exclusive of interest and costs.”

The same rule has been applied in cases exactly like the case at bar. Thus, in *Brown v. Trousdale*, 138 U. S. 389, a number of taxpayers filed their bill to enjoin the proper officers from levying a tax and to have the bonds for the payment of which the tax was levied declared void. The action was brought on behalf of the plaintiff and all others equally interested. In that case the Chief Justice said :

“The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right in respect to a separate and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute in view of the main controversy far exceeded the limit upon our jurisdiction, and

disposes of the objection of appellees in that regard."

So, in this case, the object is not to enjoin individual taxes, but to enjoin an illegal act which will result in increasing the burden of taxation generally. The interests of the complainants have not been segregated and separated. They are still jointly interested in preventing this burden of taxation.

In *Johnson v. City of Pittsburg*, 106 Fed. 763, the complainant brought his suit to enjoin the city from entering into a contract for street paving. The bill averred that the matter in controversy exceeded \$2000, and that the complainant was a taxpayer of the city of Pittsburg. The defendant filed a plea to the jurisdiction on the ground that the amount in controversy was less than \$2000, in that "The taxes that can be levied on complainant's property by reason of the performance of said contract, cannot amount to \$2000." In that case the court said:

"It will thus be noted the only question now before us is one of jurisdiction—whether the requisite jurisdictional amount is involved. After careful consideration we are of the opinion this plea must be overruled. The bill does not seek to enjoin the levy of a proposed tax or restrain collection of one levied. True, it is averred complainant is a property-owner and taxpayer, but this is evidently done to show he is not an intermeddler and on the

theory that such facts give him standing to file a bill to question the legality of the contract. If the prayer of the bill were granted on final hearing, the Asphalt Company would be deprived of a contract far in excess of the required jurisdictional sum."

So in the case at bar the allegation that the complainants are taxpayers shows that they are not mere intermeddlers, and gives them a standing to object to the illegal expenditure of far more than \$2000 and to the doing of illegal acts which will, under the allegations of the bill, result in the destruction of their business.

The rule is that the general allegation as to the jurisdictional amount is conclusive on demurrer unless the facts appearing on the record create a "legal certainty," that the jurisdictional amount is not involved.

*Barry v. Edmunds*, 116 U. S. 550.

Here, the facts alleged show to a legal certainty that the jurisdictional amount is involved.

### III.

#### DISCRIMINATION.

Complainants may be divided into two classes—banks which have an unimpaired surplus equal to 10 per cent of their capital, and banks which have not.

It is alleged in Par. IX of the bill of complaint :

"That of your orators the following have not a surplus fund equal to 10 per cent of their capital stock, to wit :

"First National Bank of Bellaire, Union State Bank of Downs, Ford State Bank of Ford, Bank of Hamlin, Farmers & Merchants State Bank of Harper, State Bank of Home City, Iuka State Bank, Exchange Bank of Lenora, Peru State Bank, Peoples Bank of Pratt, South Haven Bank, Farmers State Bank of Whiting, and Willis State Bank.

"That said banks are authorized by all of the laws of the State of Kansas and of the United States to do a banking business without such 10 per cent surplus and cannot legally compel their stockholders to submit to an assessment sufficient to create such a surplus. And said banks may not, therefore, share in the benefits of said law, if any there be."

*Banks Which Have Not a Ten Per Cent Surplus.*

Placing banks which have not a 10 per cent surplus in a separate class is arbitrary classification, and refusing to such banks the right to procure insurance for their depositors deprives such banks of property without due process of law and deprives such banks of the equal protection of the law.

"Due process of law" and "equal protection of the law" mean that the law shall apply equally both as

to the imposition of burdens and the conferring of benefits upon all who belong to the same class. The classification, however, must be reasonable and not arbitrary.

In *Gulf Ry. Co. v. Ellis*, 165 U. S. 150, this court said :

“It is well settled that corporations are persons within the provisions of the fourteenth amendment of the Constitution of the United States. *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132; *Pembina Consol. Silver Min. etc. Co. v. Pennsylvania*, 125 U. S. 181, 189, 8 Sup. Ct. 707; *Railway Co. v. Mackey*, 127 U. S. 205, 9 Sup. Ct. 1161; *Railway Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176; *Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207; *Railroad Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255; *Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called ‘corporations’ any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens. But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that, if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a

general proposition, this is undeniably true (*Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350; *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161; *Walston v. Nevin*, 128 U. S. 578, 9 Sup. Ct. 192; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533; *Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250; *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721; *Railroad Company v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396; *Marchant v. Railroad Co.*, 153 U. S. 380, 14 Sup. Ct. 894; *Railway Co. v. Matthews*, 165 U. S. 1, 17 Sup. Ct. 243), yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. **That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.**

"As well said by Black, J., in *State v. Loomis*, 115 Mo. 307, 314, 22 S. W. 350, 351, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employes any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeem-

able at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land.'

"In *Vanzant v. Waddel*, 2 Yerg. 260, 270, Catron, J. (afterwards Mr. Justice Catron of this court), speaking for the Supreme Court of Tennessee, declared: 'Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'

"In *Dibrell v. Morris' Heirs* (Tenn.) 15 S. W. 87, 95, Baxter, Special Judge, reviewing at some length



cases of classification, closes the review with these words: 'We conclude upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural, and not arbitrary.'

"In *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, the question was presented as to the power of the State to classify for purposes of taxation, and while it was conceded that a large discretion in these respects was vested in the various legislatures the fact of a limit to such discretion was recognized, the court, by Mr. Justice Bradley, saying, on page 237, 134 U. S., and page 535, 10 Sup. Ct.: 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.'

"It is, of course, proper, that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. *But before a distinction can be made between debtors, and one be punished for a failure to pay his debts*

*while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other."*

Classification must therefore rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. But an act may both grant privileges and impose burdens. In such a case, it is not enough to confer special privileges upon a few favorites of the law, selected without regard to "differences bearing a reasonable and just relation to the act," and attempt to justify the law on the ground that those upon whom the burdens are imposed are selected according to reasonable grounds of classification. Those upon whom the benefits are conferred must be selected according to reasonable grounds of classification as well as those upon whom the burdens are imposed.

*Classification with Reference to Burdens.* By the law under consideration the burdens are imposed first upon the taxpayers generally, as they pay all of the expenses of the administration of this insurance scheme. This matter of taxation has already been considered.

The burden also falls upon banks by way of assessments, or rather, certain banks are permitted volun-

tarily (so far as the face of the act is concerned) to assume this burden. The question of classification as to this burden is considered, *infra*.

The most onerous burden, however, falls upon banks which are refused the right to procure insurance for their depositors. The question of classification as to this burden will now be considered in connection with classification with reference to benefits.

*Classification with Reference to Benefits.* As has already been pointed out, the ostensible purpose of the law is to benefit certain classes of depositors in a certain class of banks, and such depositors are the only ones *directly* benefitted by the law. What the law proposes to do is to pay to these depositors the amounts owing to them by a certain class of debtors when all of the assets of those debtors are exhausted, so that it becomes certain that the debtors themselves will not pay.

Here the first question is, What is the difference which bears a reasonable relation to the purposes of the act in question which justifies the State in paying one class of creditors or creditors of one class of debtors, and not paying another class of creditors or creditors of another class of debtors? Why should the State collect and administer a fund for the benefit of A, who lost money by a failure of a bank a year ago, and refuse to aid B, who lost money by the failure of a customer who

bought goods of him, or by the failure of the private banker with whom he deposited his money, or by the failure of a bank with no surplus, or by the failure of a so-called guaranteed State bank in which he had deposited his money and taken a certificate of deposit, payable in less than six months? Admitting, as we freely do, that banks are a necessity to the business of the country, and that the State should take every precaution under its police power to *prevent* bank failures, we say that there is no more reason why, after a bank has failed, the State should pay its debts than why the State should pay the obligations of any other debtor.

“Before a distinction can be made between debtors and one be punished for a failure to pay his debts while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other.”

*Gulf Ry. Co. v. Ellis*, 165 U. S. 150.

So we say here, that before a distinction can be made between creditors and the debt due to one paid by the State and the debt due to another not paid, there must be some difference in the necessity of the creditor for the money or in the effect on the creditor of his failure to get the money.

Passing this general classification which places creditors of banks in one class and all other creditors in another class, we find that creditors of banks are classed among themselves in a most grotesque manner. Depositors in National banks are not entitled to the benefits of the law. Depositors in unincorporated State banks and depositors in incorporated State banks which have not a 10 per cent surplus, or which have not been in business for over a year (with an exception under special circumstances), are not entitled to the benefits of the law. Only depositors in incorporated State banks which have an unimpaired surplus equal to 10 per cent of their capital, and which have been in business for over one year, are entitled to the benefits of the law. Leaving out of consideration for the present the National banks, we find that the basis of classification of depositors in the State banks is the strength of the banks. Depositors in the presumably weaker banks—those which have not stood the test of time and which have no surplus—are not secured, while depositors in the stronger banks are secured.

Now, bearing in mind that this law is for the benefit of depositors, and that it is a public law to be administered by the State with funds raised by taxation, consider the unreasonableness of this classification. Depositors in weak banks, who are most likely to need

the benefits of the law, are denied them, while depositors in strong banks, who are least likely to need the benefits of the law, are entitled to them. A private insurance company, incorporated for profit, may unquestionably classify its risks and refuse bad risks. But for the State to refuse the benefits of a law to those who need them most for no other reason than because they need them most, is an anomaly. The power to pass the law arises from the necessity for the law.

*Lawton v. Steele*, 152 U. S. 133, 137.

*State v. Redmon*, 134 Wis. 89.

The State has no power to launch banking corporations with power to receive deposits and then discriminate against their depositors because the banks themselves are not so safe as some other banks. If the interest of the public requires the payment of depositors in strong banks, it doubly requires the payment of depositors in weak banks.

"The power of classification is upheld whenever said classification proceeds upon any difference which has a *reasonable relation to the object sought to be accomplished*."

*A. T. & S. F. Ry. Co. v. Matthews*, 174 U. S. 106.

The object sought to be accomplished by this law is to provide for the payment of depositors, and depositors are classed in accordance with their need for the law, and then the benefit of the law is given to the class

which needs it the least. The classification has an unreasonable rather than a reasonable relation to the object sought to be accomplished.

It is of just as much importance to the public at large that the creditors of a defunct bank which had no surplus should be paid, as that the creditors of a defunct bank which had a surplus should be paid. Presumably, the creditor of a defunct bank of the first class needs the money as much as the creditor of a defunct bank of the other class. The creditor of one bank pays taxation at the same rate as the creditor of the other bank.

In other words, if the State may use its money to pay depositors or to secure their payment it may do so only because the interests of the public generally and not because the interests of the depositors only, require it.

In *Lawton v. Steele*, 152 U. S. 133, 137, the court said :

“To justify the State in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference.”

See also—

*Hume v. Laurel Hill Cemetery*, 142 Fed. 552.

*Colon v. Lusk*, 153 N. Y. 188.

*State v. Redmon*, 134 Wis. 89.

*Fisher v. Woods*, 187 N. Y. 90.

If the State attempts to classify the depositors and to pay or secure the payment to one class and not to another the classification must rest upon some difference which makes it more to the interest of the public that one class should be paid than that another should. To classify depositors according to the banks with which they do business is purely arbitrary. It is as much in the interest of the public that depositors in one bank should be paid, as that depositors in another should be paid.

As we have already pointed out, there is no demand in the interests of the public which justifies this law. From a governmental standpoint it is the use of public money for the purpose of aiding private individuals just as loaning public money to grasshopper sufferers was (14 Kas. 418), or providing aid for fire sufferers (111 Mass. 454), or aiding a manufacturing corporation (20 Wall. 665), or paying the debts of an insolvent railroad company (89 Md. 510.)

If there can be said to be any public interest involved, however, it is that depositors should have their money to use in their various trades and enterprises. If by any stretch of legislative discretion this can be said to be a public purpose, still it must be clear that it is as much in the public interest that a depositor in a bank which did not have a 10 per cent surplus should be paid



as that a depositor in a bank which did have such a surplus should be paid. It is as much in the public interest that one depositor should have his money so that he can continue his business as that the other should. Any classification which distinguishes between the two is not founded upon a "difference which has a "reasonable relation to the object sought to be accomplished."

In *State v. Goodwill*, 33 W. Va. 179, it is said :

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and *every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void.*"

To go a step further, we find that although the object of the act is to benefit depositors, no depositor of any class is entitled to the benefits of the act as a matter of right. He can get those benefits only as a matter of favor on the part of some favored bank. No depositor can pay or compel the payment of the premium and thus acquire the benefit of this law as a matter of right. If a depositor does not do business within practical business reach of a bank which may pay the premium,

he cannot get the benefit of the law. If he does live within reach of such a bank, he cannot compel the bank to accept his deposit so that it may be guaranteed. He must go to that bank and say : I am taxed to pay the cost of administering this law. The law is presumably for the benefit of depositors. Yet the law places in your hands the power to grant or withhold its benefits. I cannot have my deposits guaranteed unless I place them in your bank and I cannot compel you to receive them.

This law cannot be distinguished in principle from a law providing that no resident of a city shall be entitled to police protection unless he buy his groceries of the chief of police.

*The law places in the hands of certain favored banks, the power to grant or withhold its benefits, and the depositors for whose benefit it was passed can get those benefits only as those favored banks may see fit to grant them.*

To summarize :

The act in question is a public law, and is administered with public funds by public officers.

The direct object of the act is to insure depositors—depositors are benefitted and not banks.

The classification of depositors who may and who may not receive the benefits of the act is purely arbi-

trary, and is not founded upon any difference that has any reasonable relation to the object of the act.

The only effect of the classification attempted by the act is to place in the hands of a favored class of banks the power to permit depositors to receive the benefits of the act or to deprive them of those benefits.

*The Effect of the Act upon Banks which Have no Surplus.*

It will undoubtedly be suggested in answer to the foregoing argument, that any depositor who desires to be guaranteed may withdraw his money from an unguaranteed bank and deposit it in a guaranteed bank. Of course there would not always be guaranteed banks within reach of all depositors, but even if there were, this answer serves only to illustrate the chief vice of the act. In order to get the benefit of this insurance scheme which they are taxed to support, taxpayers must take their money out of one class of banks and put it in a bank of the favored class. If the act were entitled "An act to promote the business of a favored class of banks," its purpose would not be more clear.

The so-called guaranteed banks may under the law (Sec. 7) advertise that their depositors are guaranteed by the bank depositors' guaranty fund of the State

of Kansas. A guaranteed bank may say to depositors in other banks: The Legislature is using the taxpayers' money to guarantee deposits, but you must bring your business to this bank if you want to have your deposits guaranteed. The Legislature has given this bank control of the law, so that it can use it as a premium to offer for business.

That this is the effect of the law cannot be questioned. Whether or not the Legislature in passing the law intended such a result, is immaterial.

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

*Henderson v. Mayor*, 92 U. S. 259.

"The courts are not bound by mere forms, nor are they misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution."

*Mugler v. Kansas*, 123 U. S. 623, 661.

The bill of complaint contains the following allegations :

PAR. IX. "That under said guaranty law the depositors in banks which have not become guaranteed banks are not guaranteed, while depositors in banks which have become guaranteed suppose themselves to be guaranteed and are led to believe by the State of Kansas and by said defendant Joseph N. Dolley as Bank Commissioner of the State of Kansas, that they are guaranteed, and all banks which have become guaranteed banks are advertised by the State of Kansas and by the Bank Commissioner thereof as guaranteed banks ; *and the result of the enforcement of said law will be to either drive unguaranteed banks out of business and force them to liquidate and wind up their business, or to force banks which have not become guaranteed to make assessments on their stockholders for the purpose of raising a surplus fund equal to 10 per cent of their capital in case they have no such surplus fund, and to cease to pay more than 3 per cent interest on deposits of any kind, and to relinquish many other valuable rights guaranteed to them by the Constitution and laws of the State of Kansas and of the United States.*"

PAR. XIV. "That said Bank Guaranty Law, in its force and effect, and in its practical application, is intended to be and is unjustly and unlawfully discriminatory in favor of and in behalf of the banks which shall accept of its provisions, and against all banks, State or National, which shall not accept of its provisions.

“That said law is in its very essence, fraudulent, and promotive of fraud and deception. In its practical workings it gives depositors a false assurance, and persuades and tends to persuade them that they are guaranteed and secured when they are in fact not guaranteed or secured. It requires of the Bank Commissioner a certificate which is false and misleading, and which in its practical working, and especially because it emanates from the sovereign State, tends to mislead and deceive the public as to the degree of security offered. It encourages, makes easy, and directly causes, false representations by so-called guaranteed banks, *which banks are securing deposits by false signs and advertisements* tending to persuade the public that their depositors are guaranteed by the State of Kansas and by an adequate special fund provided by the State of Kansas. *Said act thus gives banks which accept its provisions, the right and power, under the guise and sanction of law, to obtain deposits by false and fraudulent representation; and by virtue of said law said banks are, as a matter of fact, so obtaining deposits, to the great injury of banks honestly and fairly conducted.*

“That said law in its practical operation and effect (under and by virtue of the certificate which under the said act is to be issued by the Bank Commissioner to the banks which accept of the said guaranty provision) is intended to and will enable, authorize and empower the banks which accept the guaranty provisions to hold out to depositors and to the public that the depositors

therein are guaranteed, and that depositors in other banks are not so guaranteed, and all other banks are prohibited by the said law from giving out or advertising that their deposits are guaranteed, whereby and by reason whereof *banks of small capitalization and otherwise insecure may induce and persuade citizens of the State of Kansas, and others, to deposit their money in said guaranteed banks in preference to making such deposits in banks not so guaranteed, and therein and thereby to wrongfully discriminate against and to deplete and diminish the deposits in banks not under the guaranteed system and to the advantage of the banks which are in the guaranteed system, and as against all banks which cannot, under the terms of the act, go into the said guaranty system, and including National banks, and as against trust companies which cannot go into the system; and by reason of the premises the said act is unconstitutional and void, in that it constitutes an unlawful and unreasonable discrimination in favor of certain banks as hereinbefore described, and as against other banks and trust companies as hereinbefore described, and is unconstitutional and void, being in violation of the provisions of Section 1 of Fourteenth Amendment of Constitution of the United States, hereinbefore more specifically pleaded."*

PAR. IX. "That said banks [which have no surplus] are authorized by all of the laws of the State of Kansas and of the United States to do a banking business without such 10 per cent surplus, and cannot legally compel their stock-

holders to submit to an assessment sufficient to create such a surplus. And said banks may not, therefore, share in the benefits of said law, if any there be."

It is therefore directly alleged in the bill that guaranteed banks *are securing* deposits, and that such banks *are obtaining* deposits to the great injury of other banks. These are allegations of what has happened and not of what will happen.

It was not alleged that complainant banks had already lost all of their business when the bill was filed, or that they had already been driven to cease business. Such allegations would have been absurd, because the object of the bill was to prevent such results. It is alleged that the result of the enforcement of the law will be to drive banks out of business and force them to liquidate and wind up their business in case they cannot, as is the case of banks without the required surplus, obtain insurance for their depositors; and it is further alleged that guaranteed banks will by virtue of the law deplete and diminish the deposits in unguaranteed banks.

Loss of business is what complainants are seeking to avoid, and complainants were not compelled to wait until these results happened before asking for relief.



In the court below it was contended that these were mere matters of inference, argument or opinion, which were not admitted by the demurrer.

The rule is that on demurrer the court must consider not only the facts alleged, but all reasonable inferences to be drawn therefrom.

*U. S. v. Des Moines Co.*, 142 U. S. 510, 544.

*Denison Co. v. Thomas Co.*, 94 Fed. 651, 654.

In *City of Hutchinson v. Beckham*, 118 Fed. 399, a demurrer was overruled by the trial court, and defendants declined to plead further. Final decree was entered and appeal taken to the Circuit Court of appeals. In its opinion that court, speaking through Judge THAYER, said:

"They averred that if the city was left at liberty to enforce the tax in its own way by making daily arrests of its employés *they would eventually quit its service*; that the complainants and all other non-resident merchants in their situation would be subjected to the cost and annoyance of defending repeated suits; *that they would also be prevented from carrying on their business as they had theretofore done; that they would be compelled to transact business in competition with dealers residing in the city of Hutchinson who would not be subject to the tax; and that in this way they would sustain damages in a sum exceeding \$2000. These*

*allegations were admitted by the demurrer to be true if they were material allegations."*

In *Humes v. City of Little Rock*, 138 Fed. 929, the case was before the court "for final hearing upon the bill." In that case the court said :

"But it is alleged that the amount of the license is intentionally made prohibitory, and that if it is enforced *the plaintiff will be driven out of business*. The amount in controversy is, therefore, the value of that business, which is alleged to exceed \$2000."

Moreover, on demurrer the court must consider those facts of which it will take judicial notice.

*Lamson Co. v. Siegel Co.*, 106 Fed. 734.

The court will take judicial notice of the impulses governing human conduct ; of natural and economic laws ; of the cause and effect of competition ; and from these of the fact that depositors will place their money where they believe themselves to be secured against loss by the State rather than where they have no such security.

*State v. Arnold*, 140 Ind. 628.

*American Bank v. Bushey*, 45 Mich. 135.

*Hubbard v. Montgomery Co.*, 59 W. Va. 75.

*Davies v. Hunt*, 37 Ark. 574.

The court will also take judicial notice of matters of current history, "of what all well-informed persons ought to know," and of the general condition of the various agencies of the government under which it sits.

In *State v. Kelly*, 71 Kas. 811, the court said :

"The history and conditions of the people within the jurisdiction of a court at the time of the passage of an act which it is called upon to construe for the purpose of determining its validity are familiar to a court, and its knowledge of the same should aid it in assuming the proper viewpoint from which to discover the object of the law—particularly a law of the nature of the one under consideration. The history of a State, which should include the facts surrounding the enactments of its Legislature and the questions therein raised upon the passage of every law of an economic nature, as well as the doings of its people and the public questions which have agitated their minds, is known by a court. If the act under consideration be one passed immediately before a court is called upon to construe it, the court is as familiar with the conditions of the people as any well-informed citizen of the State. . . .

"It knows the enterprises of the people of the State in a business way quite as well as it understands the agricultural conditions. It also knows those general facts concerning the public aims and interests of the State in social and economic ways which all well-informed people know, including the questions that agitated the public mind at the

time this certain law was enacted, and knows the history of the Constitution and the reason for the adoption of certain provisions and the rejection of others.

“A court cannot divest itself of the knowledge of all these things in construing a statute or constitutional provision, even if it were disposed so to do. The consideration of this knowledge without proof of the facts is generally termed ‘judicial notice,’ and, for the want of a better expression, it will suffice; but the term means no more than that courts, in construing the law, will bring to their aid all those facts which are known by all well-informed persons because they are matters of public concern. . . .

“The principle is stated thus in section 77 of Bishop on Statutory Crimes, third edition:

“ ‘They [courts] do not close their eyes to what they know of the history of the country and of the law, of the condition of the law at the particular time, of the public necessities felt, and other like things.’

“ ‘Courts are authorized to collect the intention of the legislature from the occasion and necessity of the law—from the mischief felt, and the objects and remedy in view.’ (*Sibley v. Smith et al.*, 2 Mich. 486, 487.)

“ ‘But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. (*United States v.*

*Union Pacific R. R. Co.*, 91 U. S. 72, 79, 23 L. ed. 224.)

“ ‘Courts will take judicial notice, without proof, of events which are generally known, within the limits of their jurisdiction.’ (*State ex rel. Thayer v. Boyd*, 34 Neb. 435, 51 N. W. 964.)”

The court must therefore in passing upon the demurrer take into consideration the fact that depositors will put their money where they believe there is the smallest risk of loss ; it must consider the recent history of the country with regard to bank guaranty laws ; in order to draw reasonable inferences it must consider past experiences with reference to such laws—and the court will find not only that the results pleaded are reasonable inferences, but that they are necessary results.

In order to find these historical facts and past experience the court need not go beyond the last report of the Comptroller of the Currency. At page 89 of that report is this statement :

“Following the action of Oklahoma, the legislatures of the States of Kansas, Nebraska and Texas enacted laws providing for the guaranteeing of deposits in banks.” (Annual Report of the Comptroller of the Currency, 1909.)

At pages 25 to 29, inclusive, of the report is a list of all of the National banks in the country which went

into liquidation during the year ending October 31st 1909. One hundred and forty-nine banks are contained in this list, twenty-five of which, as is shown by page 24 of the report, were absorbed by other National banks, and therefore did not cease to be National banks. Of the remaining one hundred and twenty-four of these banks, seventy-four were National banks doing business in Oklahoma, and fourteen of those went out of business while sixty of them reorganized as State banks ; in other words, out of a total of one hundred and twenty-four National banks which during the period named ceased to do business as National banks, seventy-four of them were banks in Oklahoma under the Oklahoma bank-guaranty law, and sixty of those reorganized as State banks.

The table further shows that during the first nine months of the period covered by the report not a single National bank in Kansas went into liquidation, but during the three months which began June 1st, 1909, seven Kansas National banks reorganized as State banks. The first of these to so reorganize did so June 15th, 1909. The Kansas bank-guaranty law went into effect June 30th, 1909.

At pages 256 and 257 of the same report is a table showing the National banks which went into voluntary liquidation during the year ending October 31st,

1908. This table shows that from the 1st day of August to the 31st day of October, 1908, thirty-one National banks went into voluntary liquidation in the United States, and fifteen of those, or almost fifty per cent of them, were National banks doing business in Oklahoma, and that five of them were National banks doing business in Texas. So that twenty out of a total of thirty-one were banks which were affected by the bank-guaranty laws of Texas and Oklahoma.

At pages 22 and 23 of the same report are tables showing that in Texas one hundred and forty National banks were in voluntary liquidation from reasons other than insolvency on October 31st, 1909, in Nebraska fifty-nine, in Kansas one hundred, and in Oklahoma one hundred and sixteen.

In view of this history we say that the allegations of the bill of complaint were not extravagantly or improvidently made.

Any law that will have such a marked effect upon the business of National banks must have a much more injurious effect upon the business of smaller State banks which have no surplus.

It will not do to say that banks which have no surplus may qualify by acquiring one. As well say that a law conferring special privileges upon men worth \$50,-

000 is not unconstitutional, because all men can put themselves in the favored class by getting \$50,000.

Moreover, the provision that only banks may pay the premium is a purely arbitrary arrangement, permissible, perhaps, if it does not deprive anyone of his rights, but not permissible if it does. It is no more reasonable to say that a depositor shall not have his deposits repaid to him by the State unless he banks with a corporation which has certain qualifications, than it would be to say that a man shall not buy food unless he banks with such a corporation. It is differences between depositors which justify classification of depositors, and not differences in the corporate powers of banks which justify such classification.

In *State v. Haun*, 61 Kas. 146, 153, the court said :

"The obvious intent of the act is to protect the laborer and not to benefit the corporation. Why should not the nine employ  s who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such law is beneficial to wage-earners in the one instance, why not in the other? The nine men lawfully paid for their labor in goods at a truck store might with much reason complain that the protection of the law was unequal as to them when they saw eleven men paid in money for the same service performed for another corporation engaged in a like business. *Such inequality destroys the law.*"



The case presented to the court, therefore, is this: The State proposes to insure or guarantee deposits in banks—not merely to authorize banks to procure such insurance, but to itself insure them. It creates what is in effect an insurance company, and pays all the expenses of that company. It does not permit all depositors to be insured, and its classification of depositors is purely arbitrary, having no relation whatever to the purpose of the act. It does not permit depositors themselves to buy insurance, but permits only a certain class of banks to procure insurance for their depositors, thus putting in the hands of those banks the power to offer the benefits of this scheme and whatever good may be obtained from the expenditure of this public money as a premium to depositors to leave other banks and deposit with them.

Banks which have not a 10 per cent surplus cannot procure insurance for their depositors. The effect of this will be to deprive such banks of their business and to compel them to liquidate and to go out of business.

A law may discriminate unjustly, either directly and by direct action upon the one discriminated against, or indirectly and by affecting others. A law might provide that State banks might receive deposits but that National banks might not. This would be

direct discrimination. Or a law might provide that any person who deposited money in any bank other than a State bank would be guilty of a felony. National banks would not even be mentioned, but it cannot be doubted that such a law would discriminate against them or that such a law would deprive them of property without due process of law.

The law under consideration here does not go so far as to make it a felony to deposit money in banks without a surplus, but it does penalize those who deposit money in such banks by depriving them of all those benefits of a law to which under classification upon a reasonable basis, they would otherwise be entitled. It does not say that such banks shall not be entitled to compete for business on the same terms as other banks, but it does say that those who deposit in banks having a 10 per cent surplus shall have a privilege which is arbitrarily refused those who deposit in other banks.

It is admitted by the demurrer that the effect of this discrimination is to deprive banks which have no surplus of their business.

“The distinction between destroying what is denominated the corporate franchise and destroying its vivifying principle, is as incapable of being maintained as the distinction between the

right to sentence a human being to death and the right to sentence him to total deprivation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute."

*Osborn v. U. S. Bank*, 9 Wheat. 738.

In *Hayes v. Missouri*, 120 U. S. 68, the court said :

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier v. Connolly*, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U. S. 27, 32."

In *Yick Wo v. Hopkins*, 118 U. S. 356, Mr. Justice MATTHEWS, delivering the opinion of the court, said :

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'nor shall any State deprive any person of life, liberty or property without due process

of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, Mr. Justice HARLAN, delivering the opinion of the court, said:

"We have also said: 'The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that

in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.'”

In *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, Mr. Justice BREWER, delivering the opinion of the court, said :

“The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held.”

In *Cotting v. Kansas City Stock Yards Co. &c.*, 183 U. S. 79, Mr. Justice BREWER, delivering the opinion of the court, and quoting with approval from the opinion of Judge CATRON, in *Vanzant v. Waddel*, 2 Yerger, 260, said :

“Every partial or private law, which directly proposes to destroy or affect individual rights,

or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

In *State v. Goodwill*, 33 W. Va. 179, it is said :

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void."

"The inhibition of the Fourteenth Amendment, that no State shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons being singled out as a special subject for discrimination and favoring legislation." *State v. Mitchell*, 97 Me. 66.

In *McKinster v. Sager*, 163 Ind. 671, that court said :

"But it is not the business of the State to make discriminations in favor of one class against another, or in favor of one employment against another. The State can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws."

We submit that under all of the authorities it must be held that the act under consideration is unconstitutional and void, in that it deprives banks which have not a 10 per cent surplus of their property without due process of law.

The bill of complaint contains not only the general allegation that the matter in dispute exceeds the sum or value of \$2,000, exclusive of interest and costs (Par. II), but also the specific allegation that "the right of your orators and each of them to transact the banking business is of the value of more than \$2,000, exclusive of interest and costs."

These allegations are, of course, admitted by the demurrer.

*Banks Which Have a Ten Per Cent Surplus.*

It is alleged in the bill of complaint (Par. XVII) that :

"Said defendants, Joseph N. Dolley, Bank Commissioner, and Mark Tulley, State Treasurer, are meaning and intending to enforce each and singular of the obligations and provisions of the said law, and have already admitted a considerable number of State banks of the State of Kansas to the privileges granted under said law, and to that end have issued to certain banks certificates to that effect, and that the applications of other State banks are now pending before the Bank Commissioner for examination, and that the said Bank Commissioner threatens, means and intends to

accept and receive the said applications and to issue to the said banks so applying, certificates as provided for in Section 2 of said act, unless restrained and enjoined by the order of this court, —all of which is and will be to the irreparable damage of the complainants herein.”

As we have seen, the law discriminates in favor of banks which have been admitted, and the effect of this discrimination will be to deprive complainant banks of their business. It was contended in the court below, however, (and the contention was sustained by the trial court,) that because complainants had the option of either being admitted under the law or of staying out they could not complain of this discrimination. Appellants' contention is, that the alternatives offered are not such alternatives as make the matter optional as a matter of law. A choice between a loss of business and being driven out of business on the one hand and of doing a series of illegal acts on the other hand, is not, in fact or in law, a choice. Giving a man the alternative of being deprived of his property or of doing an illegal act is depriving him of his property without due process of law just as certainly as it would be if he were not given the alternative of doing the illegal act.

The alternatives offered to the class of banks under



consideration are to "participate" or not to "participate."

The result of not participating will be loss of business. This is admitted by the demurrer.

The result of participating will be that the bank will submit itself to a law which will compel it—

Illegally to use its stockholders' money ;

Illegally to discriminate among its depositors; and

Illegally to discriminate between its depositors and its other creditors.

It will acquire its right to do these illegal acts only by the payment of a considerable sum of money and by waiving its right to pay more than 3 per cent interest on deposits, and its right to pay interest on savings deposits withdrawn before July 1 or January 1 next following the date of deposit, and its right to pay interest on time certificates cashed before maturity.

*Illegal Use of Stockholders' Money.* The law (Section 1) provides for a resolution of the board of directors "authorized by its stockholders" before a bank may be admitted. It does not provide for a unanimous vote of the stockholders. As against a dissenting stockholder the law is unconstitutional and a bank may be enjoined at the suit of a dissenting stockholder from participating.

*Larabee v. Dolley*, 175 Fed. 365.

The use of the corporate funds for the purpose of participating under this act is therefore illegal.

It is true that this illegal use may be justified by a unanimous vote of the stockholders. But the stockholders invested their money in the stock of the bank under a contract that it should be employed only in the business of that bank and should not be risked in insuring or guaranteeing the obligations of other banks ; and under a statute providing that :

“No bank shall employ its moneys, directly or indirectly, in trade or commerce, by buying and selling goods, chattels, wares and merchandise, and shall not invest any of its funds in the stock of any other bank or corporation, nor make any loans or discounts on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith.”

Gen. Stat. Kas., 1901, § 417.

The State could not by direct compulsion take this stockholder's money and use it for the purposes of this act.

“That the act of the bank in pledging its property, as has been done in this case, to be applied to the discharge of the obligations of third parties, in the absence of the authorization of the act in question, would be an act beyond its authority, *ultra vires* and void, must be conceded. That the contract of the depositor with a bank is a private

contract, and that money taken for the purpose of reimbursing such depositor for loss sustained, or which may be sustained on such contract, is a taking of property for a private and not a public or governmental purpose, is conclusively settled. (*State v. Township of Osawkee*, 14 Kan. 418; *Lowell v. Boston*, 111 Mass. 454.) That the State may not through the exercise of the power of taxation, or by the exercise of any other governmental power, take private property for a purely private purpose is also conclusively established. (*Loan Ass'n v. Topeka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S. 487; *Cole v. LaGrange*, 113 U. S. 1; *Dobbins v. Los Angeles*, 195 U. S. 223; *Mo. Pac. Ry. v. Nebraska*, 164 U. S. 403; *Dodge v. Mission Township*, 107 Fed. 827; *Crescent Liquor Co. v. Platt*, 148 Fed. 894; *Alma Coal Co. v. Cozad*, 79 O. St. 384; *Baltimore & Eastern Ry. Co. v. Spring*, 89 Md. 510; *Lucas v. State*, 75 O. St. 114; *State v. Froehlich*, 118 Wis. 129; *William Deering & Co. v. Peterson*, 75 Minn. 118; *State v. Switzler*, 143 Mo. 287.)

"As, therefore, an attempt on the part of the Bank to employ its property for the purpose of securing the contract of deposit made by an individual with another bank, or in reimbursing such depositor for loss sustained on his contract, is clearly beyond its power and void as against complainant, a shareholder in the Bank; and as the use of money for such purpose is a purely private use, for which the State may not take it, it follows, of necessity, that that which it is beyond the power of the State to take directly, is beyond its power to authorize a corporation of its creation to take for

such purpose, against the protest of complainant, a minority shareholder dissenting therefrom ; and it must be held that the act of the State in attempting to confer such power on the Bank impairs the obligations of the contract of complainant who dissents therefrom, with the Bank, and with the State, in violation of article 1, section 10 of the National Constitution."

*Larabee v. Dolley*, 175 Fed. 365.

We submit, therefore, that the State cannot by granting special privileges to other banks by which such other banks would get all the business, compel stockholders to consent to the taking of their money.

The use of money by a bank for the purposes of this act is therefore either illegal and unauthorized, or illegal and authorized only by an authority illegally forced from the stockholders.

*Illegal Discrimination among Depositors.* As already pointed out, the following classes of depositors are not guaranteed under the law :

Depositors who receive any interest on checking accounts.

Depositors receiving more than three per cent interest on time certificates.

Depositors holding time certificates under six months.

Depositors holding time certificates over one year.

Depositors holding time certificates where interest does not cease at maturity.

Depositors with savings accounts of any kind exceeding \$100.

Depositors with savings accounts of any amount if subject to check.

Depositors with savings accounts of any amount whether subject to check or not if not subject to the sixty-day withdrawal clause.

Depositors whose deposits are primarily rediscounts.

Depositors whose deposits are primarily money borrowed by the bank.

Depositors who have any other security than the bank guaranty law.

All we have said heretofore regarding classification applies to this classification. It is arbitrary, unlawful and unconstitutional in the last degree. We defy anyone to point out why a poor laborer who has \$101 in a savings bank should not be guaranteed while a wealthy man, who, having superior information regarding the condition of the bank, has reduced his deposit to \$99, should be secured. Yet the only alternatives offered to these banks are to lose their business or place themselves where by law they are compelled to thus discriminate among their depositors.

*Illegal Discrimination between Depositors and Other Creditors.* Under the law (Sec. 4) all of the assets of an insolvent bank must be paid first to *depositors*. The janitor who has a week's wages coming to him is not entitled to anything until the depositors are paid. Here the discrimination is arbitrary and unjust.

A bank with \$2,000,000 of deposits subject to assess-

ment would be compelled to deposit \$10,000 in the "good faith" fund, and might be compelled to pay \$5,000 in assessments the first year. Thus it would have \$15,000 of its stockholders' money tied up in this scheme and would be liable for \$5,000 more each year. Yet at any time any one of its 50 or more stockholders or of its 1000 or more depositors might enjoin its further participation in the scheme, as in the case of the Exchange Bank of Hutchinson (175 Fed. 365), and if insolvency ensued its creditors could enjoin the carrying out of the scheme and the money paid by it would be wasted. By proposing to go into the scheme the bank would place upon its stockholders, depositors and creditors as to whom it stands in a fiduciary position the burden of bringing suits to protect their rights.

We submit that no bank has the right to go into a scheme of this character, and that the alternative of either losing its business or participating in this scheme is in law and in fact no alternative. The effect of the law is therefore to deprive these banks of their property without due process of law.

### CONCLUSION.

Little or no attempt was made by defendants below to justify the arbitrary classifications made by this law. Practically the only defense was that the banks could not raise the question of the constitutionality

of the law. Yet if the banks cannot, who can? The record shows that the Bank Commissioner and the State Treasurer, who should refuse to enforce the law and to waste the public funds in its enforcement, insist upon its enforcement, and that the Attorney-General, whose duty it should be to prevent its enforcement, is aiding them in their endeavor to enforce it. Depositors and creditors may not object to its enforcement until the insolvency of the bank in which they are interested. If the banks, the parties most vitally interested, may not object to the law, they must either submit to a destruction of their business or pay their money in to the State on this scheme with the knowledge that when the insolvency of any bank ensues some depositor or creditor who has been discriminated against will prevent the use of the money in the manner intended by the law.

We submit that complainant banks are entitled to relief at this time.

*Respectfully submitted.*

CHESTER I. LONG,

J. W. GLEED,

JOHN L. HUNT,

*Solicitors for Appellants.*

JOHN LEE WEBSTER,

B. P. WAGGENER,

*Of Counsel.*

## APPENDIX.

### DIGEST OF THE KANSAS BANK GUARANTY LAW.

1. The banks which are authorized and empowered to participate in the assessments and benefits and to be governed by the regulations of the act are—

**A.** Any *incorporated* State bank already doing business in this State,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital.

**B.** Any bank which may, after the passage of the act, be authorized to do business in this State,

Which shall have been actively engaged in the business of banking for at least one year,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital.

**C.** Any bank which may, after the passage of the act, be authorized to do business in this State,

Having a paid-up and unimpaired surplus equal to 10 per cent of its capital,

Doing business in a town in which all other banks shall have failed to become guaranteed banks within six months after the taking effect of this act,

Whether it has been actively engaged in business for one year or not.

A bank seeking to become guaranteed—

Must apply by resolution of directors authorized by stockholders,

Must be examined by the Bank Commissioner, and if found—

(a) To be solvent,



(b) To be properly managed,

(c) To be conducting its business in strict accordance with the banking laws of Kansas,

Must deposit with the State Treasurer the bonds and money required by subsequent sections of the act,

And will then be entitled to a certificate stating—

That it has complied with the provisions of the act, and

*“That its depositors are guaranteed by the Bank Depositors’ Guaranty Fund of the State of Kansas.”*

SEC. 2. The deposit of bonds required by the preceding section is—

A deposit “as an evidence of good faith” with the State Treasurer, subject to the order of the Bank Commissioner, which deposit must be at all times maintained, of United States, Kansas or Kansas municipal bonds such as the School Fund Commissioners are permitted to buy,

To the amount of \$500 “for every \$100,000 or fraction thereof of its average deposits eligible to guaranty (*less its capital and surplus*),” as shown by its last four statements; but

No bank shall deposit less than \$500 of bonds.

Such bonds shall not be charged out of the assets of the bank until default in payment of assessments.

Cash may be deposited in lieu of bonds.

In addition, each bank shall pay in cash,

An amount equal to 1-20 of 1 per cent of its average deposits eligible to guaranty, *less its capital and surplus*; but

No bank shall pay less than \$20,

Which payment shall be credited to “the Bank Depositors’ Guaranty Fund” with the State Treasurer.

Any bank coming in after the first annual assessment for 1910, except banks formed by consolidation or reorganization of banks already guaranteed, shall in addition to the above "be assessed an amount approximately equal to its proportionate share of the money then in the Depositors' Guaranty Fund after all losses shall have been deducted, the amount of such assessment to be determined by the Bank Commissioner."

After the making of such deposit and payment—

"The payment of such deposits of said bank as are specified in this act shall be guaranteed as herein specified."

SEC. 3. The Bank Commissioner during January in each year shall—

Make assessments of 1-20 of 1 per cent of the average guaranteed deposits *less capital and surplus*,

The minimum assessment in any case to be \$20,

Until the Bank Depositors' Guaranty Fund shall be approximately \$500,000 over and above cash deposited in lieu of bonds, and shall then discontinue assessments.

When the fund of \$500,000 shall be depleted the Bank Commissioner shall make additional assessments.

Not more than five assessments shall be made in one calendar year.

The fund shall be deposited in State depositories like other State funds, and shall be credited with the minimum rate of interest provided by law (2 per cent) on daily balances.

SEC. 4. When any bank shall be found to be insolvent, the Bank Commissioner—

Shall take charge and wind up its affairs,

Shall issue to each depositor upon proof of claim a certificate bearing 6 per cent interest, except

Where a contract rate exists on the deposit the certificate shall bear the contract rate.

After the officer in charge shall have realized on the assets of the bank and exhausted the liability of its stockholders,

And shall have paid *all funds* so collected in dividends to the *depositors*,

He shall certify all balances due on guaranteed deposits to the Bank Commissioner,

Who shall draw checks on the State Treasurer, payable out of the Guaranty Fund for such balances.

If the Guaranty Fund together with the five authorized assessments shall be insufficient, the depositors shall be paid *pro rata*, and the balance shall be paid when the next assessment shall be available.

When any money shall be paid to any depositor out of the Guaranty Fund, all claims and rights of action of such depositors shall revert to the Bank Commissioner for the benefit of the Guaranty Fund until such fund shall be fully reimbursed, with 3 per cent interest per annum.

SEC. 5. A penalty of 50 per cent shall be added to assessments not paid after 30 days' notice.

When any bank shall fail to remit the amount of an assessment, a sufficient amount of the bonds deposited by it shall be sold at public sale to pay the assessment.

Remainder of bonds shall be forfeited if the bank shall not within 60 days after default remit the full amount of assessments and penalties and restore the deposit.

Upon failure by a bank to pay assessments the Bank Commissioner shall examine it, and—

If found to be insolvent he shall take charge and liquidate ;

If found to be solvent he shall cancel its certificate as a guaranteed bank and cause to be displayed in its banking room for six months a card 20 by 30 inches, reading "in large plain type" :

"This bank has withdrawn from the Bank Depositors' Guaranty Fund, and the guaranty of its deposits will cease"—six months after the date of posting the card.

Any bank electing to withdraw from the Bank Depositors' Guaranty Fund may do so by—

Giving notice to the Bank Commissioner and

Displaying the card quoted above,

*"And at the end of six months as aforesaid may receive its bonds (provided always that said bank shall have paid assessments in full to date) when the affairs of all banks in liquidation at the expiration of said six months shall have been closed up and the said bank shall have paid its assessment on account of same."*

SEC. 6. "Deposits which do not bear interest, and the following deposits only, shall be guaranteed by this act :

"Time certificates (a) not payable in less than six months from date and not extending for more than one year, (b) bearing interest at not to exceed three per cent per annum, and (c) on which interest shall cease at maturity ;

"Savings accounts (a) not exceeding in amount one hundred dollars to any one person, and (b) not subject

to check, (c) upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal, and (d) bearing interest at not to exceed three per cent per annum."

The following are by express provision not guaranteed:

"Deposits which are primarily rediscounts or money borrowed by [from] the bank, and

"All deposits otherwise secured."

And the guaranty shall not apply

To a bank's obligation as indorser upon bills rediscounted,

To bills payable, or

To money borrowed temporarily.

SEC. 7. Banks shall keep a record of the rate of interest paid, and make quarterly statements thereof to Bank Commissioner.

If a bank pays more than 3 per cent interest on any class of deposits and advertises that its deposits are guaranteed, it must state in its advertisement that deposits bearing more than 3 per cent are not guaranteed.

No bank shall participate in the fund which—

Pays interest at a rate greater than 3 per cent per annum on any form of deposit;

Pays any interest on savings deposits withdrawn before July 1 or January 1 next following date of deposit; or

Pays interest on any time certificate cashed before maturity.

Existing contracts excepted from above.

Officers or persons acting for guaranteed banks who shall pay or promise to pay to any depositor interest

in excess of maximum rate (3 per cent) guilty of a misdemeanor.

"The display of any card or other advertisement tending to convey the impression that the deposits of the bank are guaranteed by the State of Kansas, either directly or indirectly" is made a misdemeanor.

"Any bank displaying a card or advertisement to the effect that its deposits are guaranteed by the Bank Depositors' Guaranty Fund of the State of Kansas when not authorized so to do" shall be subject to fine.

SEC. 8. Trust companies organized under the laws of this State and now in operation may reorganize as State banks.

"Any private bank or National bank having the required capital and being otherwise qualified may reorganize as a State bank ;

"Or any newly organized bank taking over the business of another bank, otherwise qualified, may immediately become a guaranteed bank by depositing bonds or money and paying its assessments and otherwise complying with the provisions of this act."

SEC. 9. A solvent bank "*upon retiring from business and liquidating its affairs*" after all its depositors shall have been paid shall be entitled to receive back its bonds but not any unused assessment ;

Provided, that if it be turning over its business to another bank it shall not receive back its bonds until the bank receiving its business shall have deposited bonds in lieu thereof.

SEC. 10. Bonds deposited may be exchanged for

other bonds "in the discretion of the Bank Commissioner."

SEC. 11. If at any examination a guaranteed bank shall be found to be violating any of the provisions of the act, it shall be notified, and given 30 days in which to comply with the act.

If it shall not comply within 30 days the Bank Commissioner shall cancel its certificate and forfeit the bonds deposited by it.

SEC. 12. All bonds and money shall be kept separate and in a separate account by the State Treasurer.

Coupons shall be cut from bonds and sent to depositing banks 30 days before due, if bank is not in default.

SEC. 13. Any National bank,

Doing business in the State of Kansas,

Under the laws of the United States,

After examination by State Bank Commissioner,  
and

Upon his approval as to its financial condition; and

*"Upon the same terms and conditions as apply to State banks,"*

May participate in the assessments and benefits of the guaranty fund.

After being admitted to such participation such National banks—

"Shall forward to the Bank Commissioner of the State of Kansas detailed reports, in form to be provided by him, of its condition on the dates of the usual called statements of State banks," and

"Shall submit to one examination each year by his

department (or oftener in his discretion), as provided by the banking laws of the State of Kansas, and pay the usual fees therefor."

Should a National bank disregard or refuse to comply with any recommendation made by the Bank Commissioner, in conformity with the provisions of this act, it shall immediately be subject to the provisions and penalties of this act and its certificate of membership in the Bank Depositors' Guaranty Fund shall be canceled.

SEC. 14. It shall be unlawful for any guaranteed bank to receive deposits continuously for six months in excess of ten times its capital and surplus.

Violation of foregoing punished by cancellation of certificate and forfeiture of bonds.

SEC. 15. All reports received by Bank Commissioner shall be preserved by him in his office.

Bank Commissioner and State Treasurer may make requisitions on State Printer for blanks and record books.

SEC. 16. "All acts and parts of acts in conflict with this act are hereby repealed in so far as they so conflict, *but no provision of any banking law or other statute of this State shall be construed to be amended, modified or repealed, except in so far as necessary to permit the unrestricted operation of this act as applied to banks participating in the privileges of this act.*"

SEC. 17. Act shall take effect June 30, 1909.



Office Supreme Court, U. S.  
F. D.  
NOV 28 1910  
JAMES H. MCKENNEY

**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1910.

No. 817.

— 0 —  
**ASSARIA STATE BANK OF ASSARIA, CITIZENS  
BANK OF AXTELL, ET AL., APPELLANTS,**

**VS.**

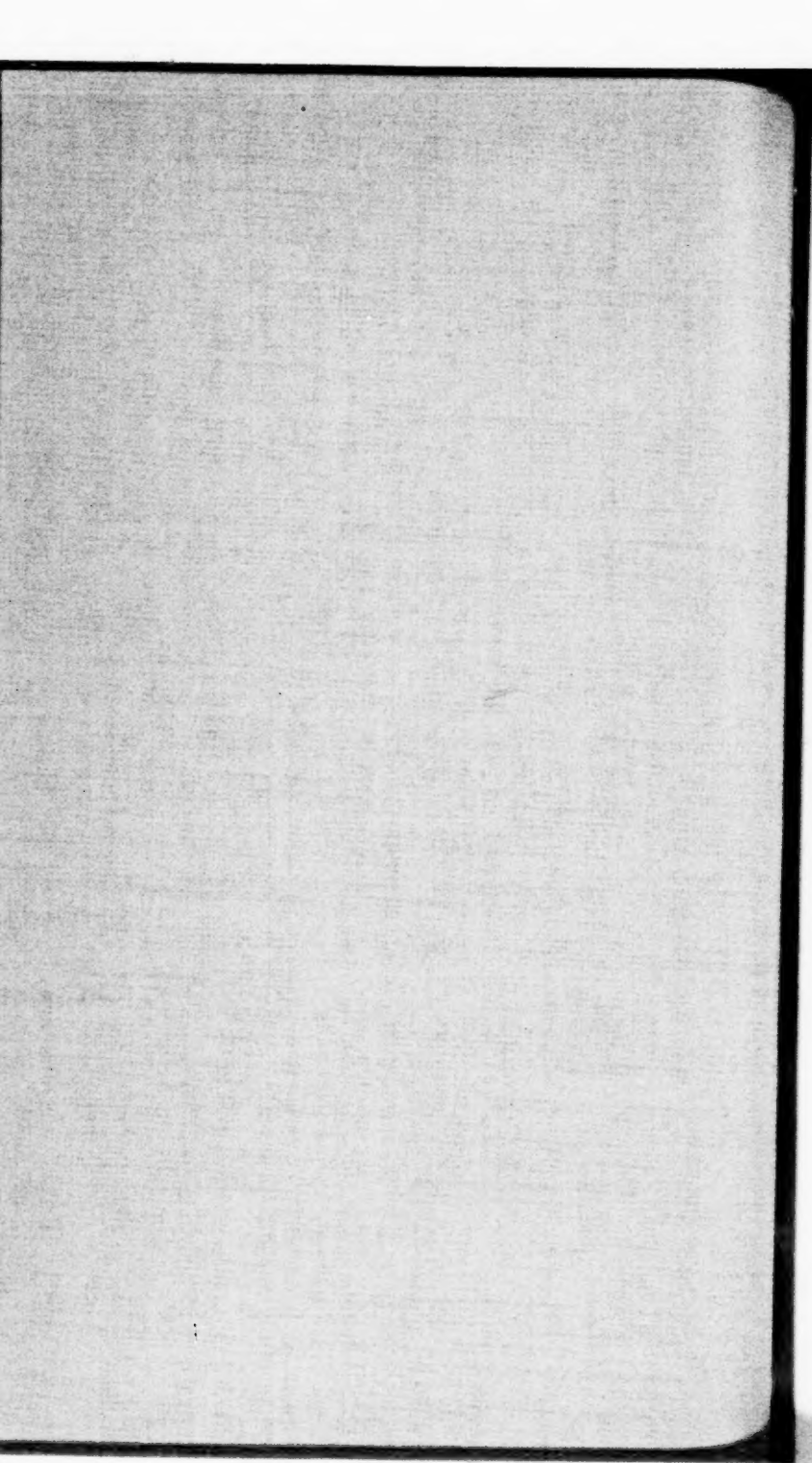
**JOSEPH N. DOLLEY, AS BANK COMMISSIONER OF  
THE STATE OF KANSAS, AND MARK TULLEY,  
AS STATE TREASURER OF THE  
STATE OF KANSAS.**

— 0 —  
**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF KANSAS.**

— 0 —  
**BRIEF FOR APPELLANTS.**

— 0 —  
**JOHN LEE WEBSTER,  
B. P. WAGGENER,  
*Solicitors for Appellants.***

**CHESTER I. LONG,  
JAMES WILLIS GLEED,  
JOHN L. HUNT,  
*Of Counsel.***



**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1910.

No. 617.

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**ASSARIA STATE BANK OF ASSARIA, CITIZENS  
BANK OF AXTELL, *ET AL.*, APPELLANTS,**

**VS.**

**JOSEPH N. DOLLEY, AS BANK COMMISSIONER OF  
THE STATE OF KANSAS, AND MARK TULLEY,  
AS STATE TREASURER OF THE  
STATE OF KANSAS.**

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**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF KANSAS.**

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**BRIEF FOR APPELLANTS.**

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**STATEMENT OF CASE.**

This is a suit in equity by 47 State Banks of Kansas on their own behalf and on behalf of all other banks in Kansas similarly situated, to have Ch. 61 of the Laws of 1909 of the State of Kansas, commonly known as Bank Depositors Guaranty Law, decreed to be unconstitutional and void and its enforcement enjoined.

The case was heard in the United States Circuit Court for the District of Kansas on the bill and the defendants demurred thereto; the demurrer was sustained and decree entered dismissing the bill. A summary of the facts set forth in the bill of complaint are as follows:

I. The complainant banks were all doing business in Kansas prior to the adoption of the Bank Depositors Guaranty Law of 1909, and that the defendants Joseph N. Dolley and Mark Tulley, in their respective capacities, are charged with the enforcement of the provisions of said law of 1909.

II. Paragraph II avers jurisdictional facts.

III. Kansas has a general banking law which took effect March 11, 1897, containing general provisions for the organization and regulation of state banks. Said general banking law contained no provision by which banks could be required to make deposits with the State Treasurer or submit to assessments for the creation of a guaranty fund for the security of depositors as in the Act of 1909 provided. At the time when the complainant banks were organized the General Banking Laws of Kansas provided (Sec. 10) that "the share holders of every bank organized under this Act shall be additionally liable for a sum equal to the par value of stock owned and no more;" and there were no provisions in the said Banking Laws by which the assets of any bank could be appropriated by the Bank Commissioner, or State Treasurer for the payment of claims of depositors in any other banks, which might fail in business. Under the General Banking Law in case of insolvency (Sec. 28) the assets should be paid to creditors of the bank without discrimination or preference. Complainant banks rely-

ing on said banking law, and acting in good faith thereunder "have made deposits with other State banks and have given credit to other State banks," relying upon the General Banking Law of the state "that in the event of insolvency of any bank or banks to which complainants have so extended credits, or with whom they have made deposits, such bank or banks would be liable unto these complainants" for the payment to them on their claims of a *pro rata* share of the assets of such insolvent banks. Complainant banks under the General Banking Laws severally received certificates authorizing them to do a banking business and under which they are entitled to continue in said banking business. Under said General Banking Laws, persons, firms and associations are authorized to do a private banking business, and private banks do exist which are denied privileges under the Bank Depositors Guaranty Law.

IV. The purpose and intent of the Bank Depositors Guaranty Law is to limit the privileges of the Act to "incorporated" banks and to *exclude private banks and trust companies*. To that end it is provided in Sec. 1, "any incorporated state bank having a paid up and unimpaired surplus fund equal to ten per cent of its capital, and any bank which may after the passage of this act be authorized to do business in this State, and which shall have been actively engaged in the business of banking for at least one year," is authorized and empowered to participate in the assessments and benefits, and to be governed by the regulations of the bank depositors' guaranty fund of the state of Kansas in said act, "provided that the limitation of one year shall not prevent such participation by a new bank at any time in any city or town in which all banks shall have neglected or failed to become guaranteed banks under the provisions

of this act, for a period of six months after the taking effect of this act.”

That by Sec. 8 of said Act it is provided that trust companies and private banks, if they shall reorganize as incorporated State Banks may become guaranteed banks by complying with the provisions of the said act as in said Sec. 8 directed and provided. The purpose and intent of said Sec. 8 coupled with the provisions of said Sec. 1, above referred to, was and is to require all trust companies and all private banks and all national banks to become incorporated state banks subject to the control of the Bank Commissioner, and by way of inducement thereto that they, when so reorganized, may become guaranteed state banks of the State of Kansas; otherwise that they shall be and are intended to be discriminated against under and by virtue of the said Act of March 6th, 1909. Said Act, while voluntary in form, is in its application, force and effect a compulsory law in that it compels all banks, private or incorporated, and all trust companies, and all national banks in the State of Kansas, to become incorporated state banks, or be unjustly and unlawfully discriminated against, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, which provides, among other things; “Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

V. It is provided in Sec. 1 that a bank desiring to become a guaranteed bank shall file with the Bank Commissioner “a resolution of its Board of Directors, authorized by its stockholders” making such request. A resolution adopted by a majority of the stockholders present at a stockholders meeting, approved by a majority of a

quorum of the Board of Directors would comply with the said statutory provision, even though absent stockholders and non-concurring directors protested, whereby dissenting stockholders and directors are deprived of property and of property rights without due process of law and are denied the equal protection of the laws in violation of Sec. 1 of Fourteenth Amendment of the Constitution of the United States, and is in violation of Sec. 1 of Bill of Rights of the Constitution of Kansas, which provides "all men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness" and in violation of Sec. 2 of said Bill of Rights, which provides "all political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit."

VI. Sec. 2 of the Bank Guaranty Law requires banks before receiving a certificate, to deposit in bonds or money \$500 for every \$100,000 of average deposits. *In addition to said deposit "each bank shall pay in cash an amount equal to one-twentieth of one per cent of its average deposits eligible to guaranty, less its capital and surplus, and the same shall be credited to the Bank depositors' guaranty fund with the State Treasurer," subject to the order of the Commissioner.. Thereupon said bank shall be entitled to a certificate reciting that it is "guaranteed" as in said act provided.*

Sec. 3 of the Act provides for an assessment in January of each year of one-twentieth of one per cent on the average deposits of each bank until the guaranty fund shall be \$500,000 and in case the fund shall become depleted for additional assessments not exceeding five (5) in number in each year of one-twentieth of one per cent.

By Sec. 4 it is provided that the Commissioner shall take charge and wind up the affairs of any insolvent bank and "*issue to each depositor a certificate*" bearing 6 per cent. After the receiver shall have realized all the assets and exhausted the *double liability* of stockholders and *shall have paid all funds so collected in dividends to* the depositors, the Bank Commissioner shall draw checks "*payable out of the bank depositors' guaranty fund*" in favor of each *depositor* for the balance due upon his claim.

*Private* depositors whose claims are guaranteed are given a preferential claim to the full amount thereof plus six (6) per cent over all other creditors of such insolvent bank and the assets so applied to the exclusion of other creditors; whereby said Act impairs the obligations existing between banks and their other creditors whose claims are not guaranteed in violation of Sec. 10 of Art. 1 and Sec. 1 of Fourteenth Amendment of Constitution of the United States.

Complainant banks are required to and do have and make deposits with other banks, and complainants so having deposits in a bank which may become insolvent will be deprived of their legal and constitutional right to share *pro rata* with other creditors in the assets of such insolvent bank, and their contracts with such bank will be impaired in violation of Sec. 10, Art. 1, and Sec. 1 of Fourteenth Amendment of the Constitution of the United States.

VII. By Sec. 6 the only deposits which have the benefit of the guarantee are: (a) Deposits not bearing interest; (b) Time certificates not payable in less than six months, and not exceeding one year from date, bearing interest not exceeding 3 per cent ceasing at maturity;



(c) Savings accounts not exceeding \$100 to one person, not subject to check and upon which 60 days' notice of withdrawal is reserved, with interest not exceeding 3%.

The following deposits are not guaranteed: (d) Deposits drawing interest; (e) Time certificate payable in less than six months; (f) Certificate running more than one year (g) Certificates bearing more than 3% interest; (h) Savings deposits for more than \$100.00; (i) Savings deposits which do not require 60 days' notice of withdrawal; (j) Savings accounts drawing more than 3% interest. All said deposits in this paragraph are arbitrarily discriminated against.

By Sec. 6 the following claims and deposits of complainant banks and other like banks are unlawfully discriminated against and do not have the benefit of the guaranty fund; (k) Rediscounts; (l) Deposits of money received from bills payable; (m) Money from other banks.

In the Banking business in Kansas it is necessary for complainant banks and others to borrow money temporarily from other banks, to rediscount paper for other banks, receive and handle checks, drafts, bills of exchange and all which claims, credits, loans and discounts are entitled to share *pro rata* with other claims against insolvent banks, but which by Sec. 6 are excluded from the benefit of the guaranty fund, and are discriminated against and excluded from any share in the assets until guaranteed depositors are first paid in full, plus interest; by reason whereof Sec. 6 is in violation of Sec. 10, Art. 1 and Sec. 1 of Fourteenth Amendment to Constitution of United States.

VIII. Sec. 7 excludes a bank from the guaranty fund which pays more than 3% interest on any deposit or on savings deposits withdrawn before July or January

1st after date of deposit, or interest on any time certificate before maturity; whereby said Sec. 7 deprives all depositors in any bank which violates said provisions of Sec. 7 *from any share in the guaranty fund*, and which said classification and discrimination is unreasonable, unjust and arbitrary; and whereby Sec. 7 violates contracts between the depositors and the banks, all in violation of Sec. 10, Art 1 and Sec. 1 of Fourteenth Amendment of the Constitution of the United States.

IX. The amount of deposit required under Sec. 2 and assessments provided for in Secs. 2 and 3 of the Act will as to each of complainant banks exceed the sum of \$2,000, exclusive of interest and costs. Depositors in non-guaranteed banks have not the benefit of the guaranty fund, while depositors in other banks are induced to believe that their deposits are fully guaranteed by the State of Kansas, the result of which will be to force unguaranteed banks out of business, or to submit to assessments upon their stockholders for the purpose of raising a surplus of 10% of their capital and to cease paying interest on more than 3% of any and all deposits, and relinquish valuable rights guaranteed to them under the Constitution and laws of Kansas, and of the United States. Thirteen of complainant banks have not the 10% surplus fund necessary to become guaranteed banks as provided in Sec. 1, yet are authorized under the General Banking Laws of the State of Kansas to continue in business, and are without legal authority to compel their stockholders to submit to an assessment to create such fund. That the value of the right of each of the complainant banks to transact a banking business is more than \$2,000 exclusive of interest and costs, and the value of the rights which the complainants would be compelled

to surrender in order to become guaranteed banks exceeds \$2,000 exclusive of interest and costs.

X. That the purpose, object and intent of the Bank Guaranty Law is to take the property of, and to compel all banks which accept of said Act, to set apart and deposit with the State Treasurer bonds, moneys and assessments as in Secs. 2 and 3 of said Act provided, to be appropriated in the payment of private claims of guaranteed depositors in any bank that may become insolvent, and which payment is a gratuity to such private depositors, and to whom the contributing banks are under no obligation, and is an unlawful and wrongful taking of the money and property of contributing banks without due process of law, and is a denial to each of them of the equal protection of the laws; whereby said Bank Guaranty Deposit Law is unconstitutional and void.

Said banks had no right to embark their funds in any scheme for the guarantee of the payment of deposits in other banks and the stockholders had a right to object thereto, and which was a valuable contract right and property right of said stockholders, and that the Bank Guaranty Deposit Law impairs the contract rights of said stockholders and deprives them of property without due process of law. It diminishes the assets of such banks which give value to said stock, and takes the property of said stockholders to pay debts for which they are in no way liable without any benefit to them, and without relieving them in any way from their liability as stockholders.

XI. Said Act is unconstitutional and void in that it creates unlawful and unreasonable discrimination between banks which do and banks which do not become guaranteed banks, and arbitrarily discriminates between

banks in this, to-wit: that banks which pay more than 3% on deposits are excluded, while banks which do not pay more than 3% may become guaranteed banks; that banks which have not a surplus equal to 10% of the capital stock are excluded, while banks having such surplus may become guaranteed banks; that banks that have not done business for more than one year are excluded, while others are not excluded; in cities where all existing banks do not accept of the Act within 6 months, a newly created bank in said city may immediately become a guaranteed bank, whereby said Act deprives banks which do not, or can not accept of its provisions, of property without due process of law, and denies to them the equal protection of the laws.

XII. Said Act creates an unlawful and unreasonable discrimination between banks in this, to-wit: banks which have equal deposits subject to guaranty, but unequal capital and surplus are not subject to the same assessments to protect the same amount of deposits, banks having the largest capital and surplus pay the smallest assessment, and banks having the smallest amount of deposits pay assessments at a higher per cent rate than other banks; whereby certain banks are deprived of property without due process of law in violation of Sec. 1, Art. 14 of the Constitution of the United States.

XIII. Said Act is unconstitutional and void in that it creates unlawful and unreasonable discrimination between depositors, and between others doing business with the same banks in this, to-wit: (a) That depositors whose deposits bear interest are excluded, while depositors whose deposits do not bear interest are included in the guaranty fund; (b) Depositors whose deposits are represented by certificates payable more than 6 months, but not

more than one year from date, bearing interest of 3% ceasing at maturity, are included, while certificates bearing different terms as to time of payment and rate of interest are excluded from the guaranty fund. (c) Depositors having savings accounts not exceeding \$100 not subject to check, and subject to 60 days' notice of withdrawal are included, while savings accounts exceeding \$100, or which are subject to check, or which are not subject to the 60 days' notice of withdrawal, or which bear interest at more than 3% are excluded from the guaranty fund. (d) Deposits not bearing interest on proof of claim are entitled to a certificate which shall draw 6% interest, while deposits which bear 3% are only entitled to a certificate bearing 3%. Said classification deprives certain depositors of the equal protection of the laws and deprives them of property without due process of law.

XIV. Said Act in its effect embarks the state in the business of an insurance company. The State printers at expense of State prints and furnishes records to be used, and Bank Commissioner and State Treasurer and their assistants are paid by the State for time employed in carrying out the law. To carry said law into effect with the 700 banks in the State would be a great expense to the State; that the State is without power to embark in the business of insurance of deposits or to spend State money in carrying the same on, whereby money is taken from the tax payer without due process of law and deprives them of property without due process of law.

That complainant banks and their share-holders are tax payers and will be required to continue to make payment of taxes, and that unless enjoined the defendants will continue to pay out of the tax fund sums of money

for the purposes stated in an amount not exceeding \$2,000 to any one bank. Said Law in its practical application is intended to be and is unlawfully discriminatory in favor of banks which do, and against all banks, State and National, which do not become guaranteed banks. It gives depositors a false assurance that they are guaranteed, when in fact not guaranteed. Said act by reason of the certificate issued to guaranteed banks enables them to hold out to the public that depositors therein are guaranteed and depositors in other banks not guaranteed, whereby banks of small capital and otherwise insecure may obtain deposits, and deplete deposits in other banks to the disadvantage of all banks which do not or can not become guaranteed; whereby said act is unconstitutional and void in that it creates an unlawful discrimination in favor of certain banks and against other banks and trust companies and is in violation of Sec. 1, Art. 14, Constitution of the United States.

Said Act is unconstitutional and void in that it creates an unlawful and unreasonable discrimination in the following particulars: (a) Depositors in one bank have the privileges of the guarantee fund while depositors in other banks do not have such privileges; (b) Certain banks by reason of the provisions of the Act are excluded while other banks may become guaranteed banks; (c) Guaranteed depositors in guaranteed banks have preferential claim over all other creditors, even to the absorption of all the assets of the bank to the exclusion of other creditors. In non-guaranteed banks all creditors share *pro rata* in the division of the assets.

XV. Paragraphs 15-16 and 17 relate to the ineffective repealing clause in the Statute and that the Sections in the Act complained of as unconstitutional are essential

and material parts of the Act without which it would not have been passed, and that the defendants mean and intend to enforce the said unconstitutional law unless enjoined, and contain a prayer for appropriate relief.

*Demurrer.* To the complaint the defendants filed a demurrer (rec. p. 27) which demurrer the court sustained and a decree was entered dismissing the bill at the cost of the complainants. (rec. p. 66).

#### ASSIGNMENT OF ERRORS.

*First.* That the said court erred in entering its decree and order sustaining the demurrer of the defendants and dismissing the complainants' bill of complaint.

*Second.* The said court erred in ruling that the complainants' bill of complaint did not set forth sufficient facts to entitle the said complainants to an order of injunction against the defendants as prayed in the said bill of complaint.

*Third.* The said court erred in holding that the complainant banks are not unduly and unlawfully discriminated against in violation of the Constitution of the United States by Ch. 61, Laws of 1909, of the State of Kansas, commonly known as the Bank Guaranty Law of the State of Kansas.

*Fourth.* The said court erred in holding that because the said complainant banks might accept the privileges of the Bank Guaranty Law of the State of Kansas, (Ch. 61, Laws of 1909), the complainant banks are not unlawfully and wrongfully discriminated against by the said Bank Guaranty Law, and, therefore can not be heard to complain of the said law.

*Fifth.* The said court erred in holding that the complainant banks which are disqualified from participating in the benefits of the Kansas Bank Guaranty Act, (Ch. 61, Laws of 1909) are not unlawfully and wrongfully discriminated against by the said Act.

*Sixth.* The said court erred in holding that the complainant banks are not discriminated against and their contract rights are not impaired on the ground that it is not averred in the bill of complaint that any of the banks in which the complainant banks have deposits, credits or contract obligations have failed, or their affairs about to be settled under the provisions of the Kansas Bank Guaranty Act.

*Seventh.* The said court should have found that Ch. 61, of the Laws of 1909 of the State of Kansas, commonly known as the Bank Guaranty Act of the State of Kansas, unjustly and unlawfully discriminated against each and all of the complainant banks and deprived each and all of the complainant banks of property without due process of law, and was, and is, as to each of the complainant banks, in violation of Sec. 10, of Art. 1, of the Constitution of the United States, which forbids any state passing a law impairing the obligation of contracts, and in violation of Sec. 1 of Art. 14, of Amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which denies to any person within its jurisdiction the equal protection of the laws, and is in violation of Sec. 17 of Art. 2 of the Constitution of the State of Kansas which provides: "All laws of a general nature shall have a uniform operation" throughout the state, and is in violation of Sec. 16 of Art. 2 of the Constitution of the State of Kansas, which provides: "No law shall be revived or amended,



unless the new act contain the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed," and by reason of the premises that (Ch. 61 of the Laws of 1909) of the State of Kansas, commonly known as the Bank Guaranty Act of the State of Kansas is unconstitutional, null and void, and that its enforcement would result in damage and irreparable injury to the complainants and each of them.

**EXCERPTS FROM THE BANK DEPOSITORS' GUARANTY LAW**

Sec. 1. "Any incorporated state bank" having a "surplus fund equal to ten per cent of its capital" and having been engaged in business "for at least one year" may become a guaranteed bank. \* \* \* "Before any bank shall become a guaranteed bank within the meaning of this Act a resolution of its board of directors, authorized by its stockholders," duly certified shall be filed with the Bank Commissioner.

Sec. 2. Each bank shall deposit with the State Treasurer bonds or money "to the amount of \$500 for every \$100,000 or fraction thereof of its average deposits eligible to guaranty." \* \* \* "In addition to above each bank shall pay in cash an amount equal to one-twentieth of one per cent of its average deposits eligible to guaranty, less its capital and surplus, and the same shall be credited to the bank depositors' guaranty fund with the State Treasurer."

Sec. 3. \* \* \* "Should such fund become depleted the Bank Commissioner shall make such additional assessments from time to time as may become necessary to maintain the same."

Sec. 4. \* \* \* "After the officer in charge of the bank shall have realized upon the assets of such bank and exhausted the double liability of its stockholders, and shall have paid all funds so collected in dividends to the depositors, he shall certify all balances due on guaranteed deposits (if any exist) to the Bank Commissioner, who shall then, upon his approval of such certification, draw checks upon the State Treasurer, to be countersigned by the Auditor of State, payable out of the bank depositors' guaranty fund, in favor of each depositor for the balance due on such proof of claim as hereinafter provided."

Sec. 6. "Deposits which do not bear interest and the following deposits only shall be guaranteed by this Act: Time certificates not payable in less than six months from date and not extending for more than one year, bearing interest at not to exceed three per cent per annum and on which interest shall cease at maturity; savings accounts not exceeding in amount one hundred dollars to any one person and not subject to check, upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal, and bearing interest at not to exceed three per cent per annum. Deposits which are primarily rediscounts or money borrowed by the bank, and all deposits otherwise secured, shall not be guaranteed by this Act." \* \* \* "The guaranty as provided for in this Act shall not apply to a bank's obligation as indorser upon bills rediscounted, nor to bills payable, nor to money borrowed temporarily from its correspondents or others."

Sec. 7. \* \* \* "No bank which pays interest at a rate greater than three per cent per annum on any form of deposit, or pays any interest on savings deposits

withdrawn before July 1st or January 1st next following the date of the deposit, or on any time certificate cashed before maturity, shall be permitted to participate in the benefits of this Act."

Sec. 8. "Any trust company \* \* \* may reorganize as a State bank under the laws of this State by filing with the Secretary of State an amended charter signifying such purpose, to be approved by the Charter Board and any *private bank or national bank* having the required capital and being otherwise qualified, may reorganize as a State bank."

#### BRIEF OF THE ARGUMENT.

##### I.

**THE SAID BANK GUARANTY LAW ON THE FACE THEREOF MAY BE TERMED A VOLUNTARY GUARANTY LAW AS DISTINCT FROM A COMPULSORY GUARANTY LAW, BUT THEREIN RESTS ONE OF ITS FUNDAMENTAL INFIRMITIES BECAUSE IT CREATES ARBITRARY DISTINCTIONS AND CLASSIFICATIONS BETWEEN BANKS AND DEPOSITORS NOT JUSTIFIED BY CONDITIONS.**

Heretofore there existed in the State of Kansas a general banking law under which all State banks (700) were organized and engaged in banking business. They enjoyed equal privileges and assumed equal obligations. Each of said banks had equal opportunities to solicit deposits, and depositors had equal claims and rights each with the other in any bank that might become insolvent. Each of the banks became organized and each of the stockholders in the respective banks assumed obligations under the law, supposing that their obligations were

equal and similar to the obligations of stockholders in each of the other banks.

The Bank Guaranty Law is intended to and does destroy these equal conditions; its purpose is to create and it does create (under the guise of a voluntary law) a classification of banks by which certain banks may become guaranty banks and other banks shall be excluded, and by which the so-called guaranty banks are to have a preference and advantage over non-guaranty banks, even though the two classes of banks may exist in the same town, or in the same county, or in the same part of the state, and where conditions are precisely the same. The said Act is intended to classify depositors so that certain depositors in guaranty banks shall have an advantage over depositors in other banks, whereas all depositors ought to stand on an equality and enjoy equal rights and privileges.

Said Act further arbitrarily makes distinctions between depositors in the same bank (if it be a guaranty bank) by which certain depositors only shall be guaranteed and other depositors shall not be guaranteed; by which certain depositors shall have the right to absorb all the assets of the bank to the exclusion of other creditors without just cause, or reason, while no such discrimination, or classification exists as to depositors in banks not under the guaranty system. The details of these arbitrary distinctions and classifications will more fully appear in subsequent branches of the argument. They are now adverted to for the purpose of pointing out that the bank guaranty law from its very nature, scope and purpose necessarily results in creating unjust and arbitrary classifications of banks, and of depositors, by which certain *banks* and certain

*depositors* are denied the equal protection of the laws, and their property taken without due process of law, and whereby favored depositors in guaranteed banks are given privileges which are denied to depositors in the same banks, and which are denied to depositors in other banks, all in violation of the Constitution of the United States.

Said statute is also in violation of Sec. 17 of Art. 2 of the Constitution of Kansas, which provides "all laws of a general nature shall have a uniform operation" throughout the state.

The natural and necessary effect of the Kansas Bank Guaranty Deposit law is to produce partial and unequal discriminations which are condemned in principle by many adjudications.

## II.

**IT IS NO ANSWER TO SAY THAT ALL BANKS CAN ACCEPT OF THE PROVISIONS OF THE GUARANTY DEPOSIT LAW AND THUS ALL BANKS BE PUT ON AN EQUALITY, BECAUSE IT IS NOT TRUE IN FACT.**

**BY THE TERMS OF THE LAW MANY BANKS ARE EXCLUDED AND OTHERS BY REASON OF CIRCUMSTANCES CAN NOT ACCEPT ITS PROVISIONS.**

(a) Incorporated banks only may accept the law, and private banks, although chartered under the general banking laws of the state, are excluded. (Sec. 1, rec. p. 19.)

(b) National banks, unless they shall subject themselves to the jurisdiction of the Bank Commissioner, and the provisions of the law (a thing impossible for want of corporate authority), or unless they shall re-incorpo-

rate as State banks, are excluded. (Secs. 8 and 13, rec. p. 24.)

(c) All banks which do not have a surplus of 10% are excluded (there are 13 of the complainant banks which do not have a surplus of 10%), although chartered and authorized to receive deposits under the general banking laws of the state, are excluded. (Sec. 1, rec. p. 19.)

(d) Newly organized banks until they have done business for one year are excluded, except they be located in a city where all other banks therein have failed for six months after the passage of the law to become guaranteed banks. (Sec 1, rec. p. 19.)

(e) Banks which have not and can not obtain the requisite consent of their stockholders and Board of Directors are excluded. (Sec. 1, rec. p. 19.)

(f) Banks which pay interest at a greater rate than 3% upon any form of deposit are excluded. (Sec. 7, rec. p. 23.)

(g) Banks which pay interest on savings deposits withdrawn before July or January 1st next following the date of the deposit are thereafter excluded. (Sec. 7, rec. p. 23.)

(h) Banks which pay interest on time certificates, cashed before maturity, are excluded. (Sec. 7, rec. p. 23.)

(i) Trust companies, although authorized under the general banking laws to receive deposits, are excluded. (Sec. 8, rec. p. 23.)

(j) *It is the claims of depositors that are to be secured, yet depositors have no voice as to whether a bank will or will not, or can or can not become a guaran-*

*teed bank. It follows as of course that depositors in all banks which can not, or which do not accept of the law are arbitrarily discriminated against.*

But should these difficulties *supra* be overcome (they never can be), and all banks should become subject to the guaranty law, only one difficulty is removed. Others, equally grave, it is impossible to remove. Only a limited class of depositors are guaranteed and other depositors and creditors are put at an arbitrary disadvantage. (Sec. 6.) Banks, State and National, in the business of banking find it essential to have deposits in other banks; to accept checks drawn upon, and bills of exchange issued by other banks, and to make temporary loans to other banks, and to rediscount notes for other banks, yet, as to all these claims complainant banks are excluded from the benefits of the guaranty feature of the law. All the assets of an insolvent bank shall first be taken to pay the claims of *depositors*. Banks which have loaned their credit to, or have made deposits with said insolvent bank, are deprived of their property without due process of law and are denied the equal protection of the laws. This same line of argument applies with equal force to each and singular of the classes of deposits, which, under Sec. 6 of the Act, are excluded from the guaranty feature. Thus we reach the inevitable conclusion that it is impossible under this statute to obtain either uniformity, or equality of rights, or privileges, and hence that the law is obnoxious to the long line of decisions which hold that laws must be uniform as to persons and classes under similar conditions.

## III.

**THE ARBITRARY AND CAPRICIOUS DISCRIMINATIONS BETWEEN DEPOSITORS AND OTHER CREDITORS, RENDERS THE BANK GUARANTY DEPOSIT LAW UNCONSTITUTIONAL.**

By Sec. 6 of the Act depositors who may have the benefit of, and depositors who are excluded from the guaranty fund are as follows:

(a) Private deposits subject to check and not bearing interest are included, while like deposits which bear interest are excluded.

(b) Time certificates not payable in less than six months from date and not exceeding more than one year, bearing interest not exceeding 3%, and which interest shall cease at maturity, are included, all other time certificates are excluded;—time certificates payable in less than six months are excluded;—certificates running for more than one year are excluded;—certificates bearing interest at more than 3% are excluded.

(c) Savings deposits not exceeding in amount \$100 to any one person and not subject to check and upon which the bank has reserved in writing the right to require 60 days' notice of withdrawal and bearing interest not to exceed 3% are included. Savings deposits exceeding \$100 to any one person are excluded. Savings deposits upon which the bank has not reserved the right to require 60 days' notice of withdrawal are excluded. Savings deposits which draw interest exceeding 3% are excluded.

(d) Deposits which are primarily rediscounts are *expressly* excluded.



(e) Accounts for money borrowed by the bank are expressly excluded.

(f) All deposits in the bank which are otherwise secured are expressly excluded.

(g) An insolvent bank's obligations, as endorser upon bills rediscounted, are expressly excluded.

(h) The liability of the bank on bills payable are expressly excluded.

(i) Claims for money borrowed temporarily from correspondent banks are expressly excluded.

(j) All claims of creditors of every kind and nature, other than for deposits above enumerated as included, are excluded.

(k) All of the assets of the bank, including the double liability of stockholders, shall first be appropriated to the payment in full of the claims of depositors to the exclusion of all other creditors. (Sec. 4, rec. p. 21.)

What reason can be given to justify a law which provides that a deposit which does not draw interest shall be guaranteed and paid in full to the exclusion of a deposit which may draw interest? Is it the purpose of the law to prevent a depositor receiving interest, or contracting to receive interest on a deposit? Has the legislature a right to say that a man who has money shall be deprived of his constitutional right of contract, or that if he does contract for interest, that he shall be deprived of an equal right with others to collect, or receive back his money? Does the fact that a depositor may contract for, or receive interest, justify the enactment of a law which not only deprives him of his property right of contract, but also denies him an equal right with other depositors in the collection of his deposit and denies to him the equal protection of the laws?

In the case of time certificates the depositor may receive 3% interest up to the date of maturity, but his deposit is guaranteed only on condition that it shall not be payable in less than six months, nor exceeding one year from the date of the certificate. Has not the holder of a certificate the same constitutional right to have his deposit protected and paid whether the certificate runs for three months, six months, twelve months or eighteen months? Where does the state get the authority to say that if the deposit is for less than six months, or for more than twelve months it shall not be guaranteed, while if the time limit is anywhere between the period of six or twelve months it shall be guaranteed? Might not the legislature just as well say that if two men loan money to the same person, secured by a mortgage upon real estate, and one of them takes a note drawing 3% interest and payable not less than six months, nor more than twelve months from date, and the other takes a note payable either in less than six months, or more than twelve months from date, or contracts for more than 3% interest, that the first man shall have priority in payment, even to the exhaustion of all the mortgaged property and to the exclusion of the other? Confessedly such a law would be held unconstitutional. Is there any distinction between the illustration stated and the provision in Sec. 6 of the guaranty banking law?

Why the distinction between general deposits and savings deposits? Why should the merchant who may have a deposit ranging anywhere from \$100 to \$5,000 have a preferential right to collect his entire deposit, to the exclusion of savings deposits, and have any deficiency paid by the state, and the same right and privilege be denied to the laborer or mechanic or servant who may have a savings deposit exceeding \$100?

Said provisions relating to savings deposits is subject to another severe criticism, to-wit: that no part of such account shall be guaranteed unless the bank "has reserved in writing the right to require sixty days' notice of withdrawal." That is to say, that the savings account deposit shall not have the guaranteed or preferential right of payment, which attaches to other individual deposits, if the bank has not made the special provision in writing to require sixty days' notice of withdrawal. In other words, if said reservation is not in writing the savings account is not guaranteed. If the notice of withdrawal is limited to thirty days, or forty days, or fifty days, the account is not guaranteed. Why is not a depositor, in the form of a savings account, entitled to the same constitutional protection, both as to property, as to the right to contract, and to due process of law and to the equal protection of the laws which attach to other depositors? Where the authority to make this unconstitutional discrimination against savings deposits?

Deposits which are rediscounts, or money borrowed by a bank, shall not come within the guaranty. It is not uncommon for banks to obtain money from correspondent banks in times of depression. By this method, banks may enable each other to meet the demands of their depositors. What good reason can be given why banks having a claim upon another bank for money upon a direct loan, or by a rediscount, shall not have the same right as that of a private depositor to have their claims paid pro rata? Why should a debt which an insolvent bank may owe to another bank for a loan, or a rediscount be discriminated against in favor of a debt which the same insolvent bank may owe to some private person, or firm, or corporation? How can you justify taking all of

the assets of the insolvent bank (which assets may include the result of the loan, or rediscount from another bank), and appropriate the same to the payment of depositors and to the exclusion of the claims of other creditors? This policy results in an unjust and arbitrary discrimination against other banks, State and National. It may go so far as to make it impossible for the bank to obtain credit to protect its depositors during a period of time necessary to realize upon its own assets and securities, and thus be unnecessarily forced into a receivership to the damage and loss of its general creditors.

The liability of a bank upon bills payable are excluded from the guaranty. The result is that persons who deposit money in the bank and take out in lieu thereof a draft, or bill of exchange, are without the guaranty. So all obligations of a bank of every kind and nature by which a bank becomes indebted to another (except the favorite depositors), are excluded from the guaranty. How justify such arbitrary discrimination?

*The long and short of this guaranty law is that private deposits which may constitute a very limited part of the cash assets of the bank are made the favorites of the statute and are entitled to take all of the assets to the exclusion of other creditors who, under the constitutions of the State and of the United States, are entitled to equal protection.*

The discrimination between the different classes of depositors and between depositors in different banks in the same town, or in the same locality, and under like conditions, renders the act unconstitutional, in that it deprives them of the equal protection of the laws. The guaranteed depositor may enforce his claim under the law of 1909, but depositors in non-guaranteed banks must enforce their remedy under the *general banking law* of

the state. All *creditors* of the bank, other than private depositors, can have their remedy *only* under the general banking law of the state. One law provides that depositors shall be paid in full, even though such payment takes all of the assets of the bank, in which case, other creditors of the same bank are deprived of all remedy for the enforcement of their claims. "The equal protection of the laws," in the 14th Amendment is a guaranty "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances." *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540-559. *Ritchie v. People*, 155 Ill., 98, 105-6. *State vs. Hinman*, 65 N. H., 103, 23 Am. St. Reps., 22-25. *State v. Montgomery*, 94 Me., 192, 80 Am. St. Reps., 386. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79-109-112.

#### IV.

**THE FACT THAT IN THE SAME CITY, OR LOCALITY SOME BANKS MAY AND SOME MAY NOT BECOME GUARANTEED BANKS PRODUCES SUCH AN ARBITRARY AND UNLAWFUL DISCRIMINATION BETWEEN DEPOSITORS OF THE SAME CLASS AS RENDERS THE WHOLE ACT UNCONSTITUTIONAL.**

In the preceding chapter of this brief we were dealing with the discrimination between depositors in the same bank. The actual and practical working of the law presents a condition much more offensive to justice and fair dealing, and equally, if not more obnoxious to the constitutional provisions. In the same locality some banks have accepted the guaranty provisions and others have not, so that in the same town, or same county, there may be depositors who are entitled to share in the guar-

anty provisions under the law, and there are other depositors of the same kind and class and in every way entitled to the equal protection of the laws, who by reason of having their deposits in a neighboring bank are deprived of the guaranty provisions, and all without any fault or choice of their own. Depositors in bank (a) have no voice as to whether said bank shall, or shall not become a guaranteed bank, but the state steps in and says to its depositors (if the bank be not a guaranty bank) that their deposits shall not be guaranteed. The same state says to the depositors in bank (b) that their deposits shall be guaranteed. The state says to one set of depositors you may take all of the assets of the bank to pay your claims, and, if said assets are not sufficient, that the state will make up the deficiency by an appropriation out of the guaranty fund on deposit with the State Treasurer. The state says to the depositors in the non-guaranteed bank that they shall share only pro rata with all other creditors of the bank in which they have made their deposits, yet all these depositors may live in the same town, be engaged in the same kind of business without any possible line of distinction between them, except this arbitrary and capricious legislation enacted under the false, deceptive and misleading guise of a bank guaranty law.

In *McKinster v. Sager*, 163 Ind., 671 (106 Am. St. Reps., 268), the court, in speaking of a statute which discriminates between creditors, said: " 'But it is *not* the business of the state to *make discriminations* in favor of one class against another, or in favor of one employment against another. The state can have *no favorites*. Its business is to protect the industry of all, and to give all the benefit of equal laws.' "

But "arbitrary selection" can never be justified by calling it classification, the equal protection demanded by the Fourteenth Amendment forbids it. *Gulf, Colorado & Santa Fe R'y v. Ellis*, 165 U. S., 150-159. *McKinster v. Sager*, 163 Ind., 671. (106 Am. St. Reps., 268-277.) *Storck v. Baltimore City, et al.*, 101 Md., 476. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79-107.

*The Kansas bank guaranty law does not make banks more solvent than they are under the general banking laws. It is a law designed solely to favor certain depositors.*

Why not as well pass a statute requiring all depositors to surrender to the bank a part of their deposits to be set aside as a guaranty fund to pay depositors? Such a statute would add to the strength and assets of the bank. Why not pass a statute requiring all patrons of a bank who borrow money from the bank, or whose notes the bank discounts, to set aside a part of the money borrowed as a fund to secure the prompt payment to the bank of all loans and discounts? Such a statute would tend to make the bank more secure in times of financial depression. Banks would not fail if they could speedily realize upon their loans or securities. Would any man who favors the present bank guaranty law agree that such statutes, as suggested *supra*, would be constitutional? If such statutes would not be constitutional, what argument can be made to support the constitutionality of the statute in question?

## V.

**DEPOSITORS HAVE NO VOICE IN DECIDING WHETHER A BANK WILL OR WILL NOT COMPLY WITH THE BANK GUARANTY LAW, THE RESULT IS THAT DEPOSITORS, IN ORDER TO OBTAIN THE ADVANTAGES OR BENEFITS OF THE BANK GUARANTY LAW, MUST DEPOSIT THEIR MONEYS ONLY IN BANKS WHICH DO ACCEPT OF THE LAW AND WHICH MEANS A DISCRIMINATION AGAINST, AND DESTRUCTION OF, THE BUSINESS OF BANKS WHICH DO NOT, OR CANNOT COMPLY WITH THE CONDITIONS OF THE BANK GUARANTY LAW.**

Independent of the discrimination between depositors, or as against creditors of a bank, the law is equally obnoxious to the constitution, in that it is a discrimination between banks. It discriminates in favor of banks that accept of its provisions, and against banks which do not and cannot accept of its provisions. *If there be in truth and in fact any good reason why depositors in banks should be guaranteed, the same reason would induce depositors to withdraw their money from banks not guaranteed and deposit their money in guaranteed banks.* Is it the purpose of the state to wrong, or discredit the bank duly authorized to do business under the general banking laws of the state simply because its directors or stockholders are unwilling to become a guaranteed bank, or because the bank is precluded from becoming a guaranteed bank under other provisions of the statute, to-wit: not having the surplus fund of 10%, or which pays interest on any form of deposits at a rate exceeding 3%; or private banks, or trust companies which cannot become guaranteed, or national banks which have no corporate power to become guaranteed banks?

Under the general banking law of the state of Kansas all banks were created with the expectation and un-



derstanding that they were to stand on an equality. That general banking law is still in force as the law of the state. The bank guaranty law does not repeal the old law, neither does it create a new law that shall govern all banks, or that shall be uniform as to all banks. It seems to have no purpose, or object, except to create a favorite class of depositors, and a favorite class of State banks, and to discriminate against all other persons, and against all non-guaranteed banks—and against all banks as creditors of other banks. It is an illustration of the strong hand of the state being laid upon the assets of the guaranteed banks and appropriating the same as a gratuity to pay the private claims of a private depositor that has become the favorite of state legislation.

*Neither the right to regulate nor the police power of the state can be used as a weapon to destroy.* "All persons should be equally entitled to pursue their happiness and acquire and enjoy property." *Barbier v. Connolly*, 113 U. S., 27-31; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79-106. The Supreme Court of Kansas in *State v. Haun*, 61 Kan., 146, among other things said, p. 153: "Why should not the nine employees who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such law is beneficial to wage earners in one instance, why not in the other?" Why not logically apply the same principle to the banks not guaranteed as well as to guaranteed banks, likewise as between banks themselves? One of the limitations of the police power is that it shall not enter "the realms of the destructive." *State v. Redmon*, 134 Wis., 89-105.

Conceding the power to reasonably regulate the business of banking, said power to regulate is not a power to destroy nor to take away the property of the banks

without due process of law and without just compensation. The above suggestion is sustained by the underlying principles in the following cases: *Lake Shore Ry. Co. v. Smith*, 173 U. S., 696; *Budd v. New York*, 143 U. S., 547; *Smyth v. Ames*, 169 U. S., 466; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 97; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79.

## VI.

### THE POLICE POWER IS THE LAW OF NECESSITY.

#### THE KANSAS BANK DEPOSITORS' GUARANTY LAW IS NOT AN EXERCISE OF THE POLICE POWER BECAUSE IT LEAVES IT VOLUNTARY WITH BANKS WHETHER THEY WILL OR WILL NOT BECOME GUARANTEED BANKS.

By the literal terms of the Kansas Bank Depositors' Guaranty Law it is left to the option of banks whether they will or will not become guaranteed banks. *If there exist a necessity in Kansas that all depositors in banks should have the benefit of the guaranty law, then the law to bring it within the scope of the police power should be compulsory upon all banks which receive deposits.* By the terms of said law private banks and trust companies, although chartered under the laws of the state, are prohibited from becoming guaranteed banks, wherefore, their depositors are not and can not have the benefit of the guaranty. The same principle applies to thirteen of the complainant banks which do not have the 10% surplus. The same principle applies to all banks which can not obtain the requisite consent of their stockholders and board of directors. *Wherefore, it appears upon the face of the law that the legislature of Kansas did not act upon the belief that a necessity existed for the guaranty*

of all bank depositors. They selected some and they excluded others.

In *Bryan v. City of Chester*, 212 Pa. St. 259, the court quoted with approval from *Crawford v. City of Topeka*, 51 Kans., 756: "All statutory restrictions of the use of property are imposed upon the theory that they are *necessary* for the safety, health or comfort of the public; but a limitation without reason or *necessity* cannot be enforced."

In *City of Passaic v. Patterson, etc. Co.*, 72 N. J. Law, 285, the court said: "It is *necessity* alone which justifies the exercise of the police power to take private property without compensation." The three last cases *supra* were quoted with approval in *People v. Murphy*, 195 N. Y., 126, and to which the court said (p. 135): "The classification, as well as the ordinance itself, must be based upon some *necessity* justifying the exercise of the police power. It has been said that the police power of a municipality is allied to the right of *self-preservation* in an individual."

In *Chy Lung v. Freeman et al.*, 92 U. S., 275, Mr. Justice Miller said, p. 280: "Such a right can only arise from a *vital necessity* for its exercise, and cannot be carried beyond the scope of that *necessity*." In *Railroad Co. v. Husen*, 95 U. S., 465, Mr. Justice Strong said, p. 472: "It may not interfere with transportation into or through the state, beyond what is *absolutely necessary* for its self-protection."

In *State vs. Redmond*, 134 Wis., 89, the court said, p. 110: "The doctrine that the police power is really a law of necessity forms the key, it would seem, with which to unlock the mysteries, so far as practicable, of what is within and what is without the limits of such power."

In *City of Belleville v. Turnpike Co.*, 234 Ill., 428, the court said, p. 437: "It is co-extensive with self-protection, and is not inaptly termed the law of overruling necessity." It was on this principle that in *Sayre Borough v. Phillips*, 148 Pa. St., 482, a statute of Pennsylvania was declared to be unconstitutional because it applied to certain persons and not to others who are engaged in the same trade or pursuit. To justify the statute under the police power it should be the result of a demand of the public generally and there should be such an exigency for its enforcement to protect the public *that it should apply to all alike who are engaged in the same business*. Hence, in the Pennsylvania case the statute was held to be not within the police power.

If it be the law that a *necessity* must exist for the exercise of the police power the statute cannot be justified as an exercise of the police power which *leaves it to the will or caprice* of the citizen or the bank whether they will or will not accept of its provisions. The mere fact that it is *voluntary* is a declaration on the face of it that it is *not within* the police power and is not an exercise of the police power.

## VII.

**THE POLICE POWER CAN ONLY BE EXERCISED WHEN NECESSARY TO ACCOMPLISH A PUBLIC NEED. IT MUST BE DEMANDED BY THE PUBLIC GENERALLY AS DISTINCT FROM THE DEMAND OF A CLASS.**

The bank depositors' law extends its benefits to a class of depositors, to-wit: to deposits which do not draw interest; to savings deposits limited to \$100, and excludes deposits in private banks, deposits in trust companies, deposits in non-guaranteed banks, to savings deposits

exceeding \$100, etc. (For further classification see chapters 2 and 3 of this brief.)

What necessity, real or imaginary, can justify a statute which declares in terms that depositors in one bank or class of banks shall be guaranteed, and declares that depositors in another bank or class of banks shall not be guaranteed? What rule of necessity can justify a statute which declares that favorite deposits shall be guaranteed and other claims against *the same bank* shall not be guaranteed, such as claims for rediscounts, money borrowed, etc.?

In *Lawton v. Steele*, 152 U. S., 133, the court, speaking to this point, said, p. 137:

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, *that the interests of the public generally*, as distinguished from those of a *particular class*, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

In *Hume v. Laurel Hill Cemetery*, 142 Fed., 552, the court, in speaking to the same point, said, p. 565:

"In such instances, it should appear to the court that the conditions are such that the *interests of the public generally* justify such legislation, and that the act itself is *reasonable in its scope* and practical application."

In *Fisher Co. v. Wood*, 187 N. Y., 90, the court, speaking to the same point, said, p. 94:

"To justify the state in interposing its authority in behalf of the public, it must appear that the *interest of the public generally*, as distinguished from those of a particular class, requires such interference and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."

In *State vs. Redmon*, 134 Wis., 89, the court drew special attention to this limitation of the police power and said, p. 111:

“Controlling significance should be attached to the words above quoted, ‘the interests of the public generally,’ etc., ‘require such interference.’ Not that some individuals now and then, or even generally, demand it, or require it, but that the interests of the people generally require it. In other words, that it is reasonably essential or necessary to such interests that the subject thereof should be dealt with by the legislature.”

*If a statute under the police power can only be justified when demanded by the public generally, it should be a law which should be enforced against all persons and applied to all persons to which the demand applies.* It is illogical to say that the public demands that depositors shall be guaranteed and at the same time have the law so framed that it is voluntary whether the depositors shall be or not be guaranteed. The same suggestion applies as to whether banks shall or shall not become guaranteed banks. A voluntary law is not in compliance with any demand for the protection of the rights of the public as depositors in banks.

### VIII.

**THE POLICE POWER DOES NOT RECOGNIZE FAVORITES.  
THE POLICE POWER WILL NOT JUSTIFY ARBITRARY OR CAPRICIOUS CLASSIFICATIONS.**

The fact that the bank depositors law grants its benefits to certain depositors and to certain banks, and refuses its benefits to other depositors and to other banks, renders the statute unconstitutional.

The Supreme Court of Kansas, in *State v. Haun*, 61 Kan., 146, aptly said, p. 153:

“The obvious intent of the act is to protect the laborer and not to benefit the corporation. Why should not the nine employees who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such law is beneficial to wage-earners in the one instance, why not in the other? The nine men lawfully paid for their labor in goods at a truck store might with much reason complain that the protection of the law was unequal as to them when they saw eleven men paid in money for the same service performed for another corporation engaged in a like business. *Such inequality destroys the law.*”

So we say here. If the guaranty law is a good thing for depositors in banks, why give it to some depositors and refuse it to others?

*Ritchie v. The People*, 155 Ill., 98, is a case wherein the court held a statute of Illinois, relating to the employment of labor, to be unconstitutional on the ground that it interfered with the liberty of the right to contract. The principle upon which the decision rested will be found stated on p. 105, where the court, in dealing with the *inequality of all under like circumstances*, said:

“The ‘law of the land’ is ‘general public law binding upon all the members of the community, under all circumstances, and *not partial or private laws*, affecting the rights of private individuals or classes of individuals.’ (*Millett v. The People*, 117 Ill., 294.) The ‘law of the land’ is the *opposite* of ‘arbitrary, unequal and partial legislation.’ (*The State v. Loomis*, *supra*.) The legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions.” \* \* \* “In line with these principles, it has been held that it is not competent, under the constitution, for the legislature to single out owners and employers of a particular class, and provided that they shall bear burdens not imposed on other owners of

property or employers of labor, and prohibit them from making contracts which other owners or employers are permitted to make. (*Millett v. The People, supra; Frorer v. The People, supra; Ramsey v. The People, 142 Ill., 380.*)”

*State vs. Montgomery*, 94 Me. 192, 47 At. 165, 80 Am. St. Reps. 386, is a case which involved the constitutionality of a statute of Maine, which excluded aliens from its privileges. The state endeavored to justify said classification, but the court held the statute unconstitutional. In the opinion of the court, speaking directly of the principle involved in the case at bar, said, pp. 391 and 394:

“ ‘The equal protection of the laws’ is guaranteed to all. ‘The equal protection of the laws’ places all upon a footing of legal equality, and gives the same protection to all for the preservation of life, liberty and property and the pursuit of happiness.’ ”

“The inhibition of the Fourteenth Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation.”

• In the light of the above cases we put the query, What right has the State of Kansas by a special or particular statute to single out certain depositors of certain banks for its favoritisms, and to single out other banks for hostile legislation? Keep in mind that *all banks* existing in the State of Kansas are engaged in a *lawful business*, chartered under the general banking law of the state. The bank without 10% surplus, as a corporation, is entitled to the equal protection of the laws with the bank having more than 10% surplus, so of *private* bankers, *trust* companies, banks which pay more than 3% on deposits, etc. What right, we say, has the State of Kansas to single out



these banks for discriminating legislation and favorite legislation for other banks?

*Concretely stated, the question is, has the State of Kansas a right to pass a special law which applies to certain depositors and to certain banks, when by a general law therefore existing, all banks and all depositors stand on an equality? Is not such special law unconstitutional?*

The principle which lies beneath the above sentence, printed in italics, is supported in the cases cited *supra*, and is particularly marked in *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Reps. 683, which held unconstitutional a statute which provided that operatives and laborers engaged in mines and factories should have their wages paid in money of the United States. The statute did not apply to all operatives and laborers, although, manifestly, under the general law of the land, all operatives and laborers are entitled to equal protection in the payment of their wages. The statute was held unconstitutional, because it was "class" legislation. It was a special law for the benefit of a class, just as is the Kansas Bank Guaranty Law, a special law for the benefit of a class of creditors of banks, and for the creation of guaranteed banks as a class; singling them out from the other banks of the State of Kansas, incorporated and chartered under its general banking laws. In the West Virginia case the court said, p. 866:

"The right of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void. Were it otherwise, odious

individuals or corporate bodies would be governed by one law, and the mass of the community, and those who make the law by another whereas a like general law affecting the whole community equally could not have been enacted."

Equality of right, equal protection of the laws, the protection of equal laws, are phrases almost synonymous and require that all shall be *treated alike*. Any statute which departs from this principle is declared to be "class legislation" and universally condemned.

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**GOOD INTENTIONS ON THE PART OF THE LEGISLATURE  
WILL NOT JUSTIFY THE DISCRIMINATIONS.**

In *Bonnett v. Vallier*, 136 Wis., 193, it is said, p. 200:

"Good intentions in the passage of a law or a praiseworthy end sought to be attained thereby cannot save the enactment if it transcends, in the judgment of the court, the limitations which the constitution has placed upon legislative power.

"The appeal is often made to courts directly or indirectly to look favorably upon a law because of the worthy purpose in the minds of the promoters in securing its place upon the statute books. That cannot go to the extent of causing hesitancy or failure to condemn a legislative act which clearly exceeds the lawmaking power."

\* \* \* "The greatest constitutional lawyer of our country during its early history aptly said:

"Good intentions will always be pleaded for every assumption of power, but they cannot justify it. The constitution was made to guard the people against the dangers of good intentions. When bad intentions are boldly avowed the people will promptly take care of themselves. They will always be asked why they should resist or question the exercise of power which is so fair in its object, so plausible and patriotic in appearance, and which has the public good alone confessedly in view. Human beings, we may be

assured, will generally exercise power when they get it, and they will exercise it most undoubtedly under a popular government under the pretense of public safety or high public interest.' \* \* \* 'They think there need be little restraint upon themselves.' "

## IX.

**THE KANSAS BANK GUARANTY ACT, WHEN LOOKED AT COLLECTIVELY, IS SO FULL OF CLASSIFICATIONS THAT ARE ARBITRARY AND UNREASONABLE, AND OF DISCRIMINATIONS WHICH ARE UNLAWFUL THAT THE ENTIRE ACT MUST BE DECLARED TO BE UNCONSTITUTIONAL.**

It may be said of the classifications between banks that they are arbitrary and that the discriminations between banks are arbitrary. The same is true as to the classifications of depositors and as to the discriminations between depositors. This evil assumes more serious gravity in the discriminations in favor of depositors and against creditors, against claims of banks arising out of re-discounts, and against claims of banks for moneys loaned. The rule of law is that classifications and discriminations are invalid unless they can be justified upon some *reasonable* ground, otherwise, they are regarded as *arbitrary* and *capricious* and condemned by the law and the constitution.

In *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S., 150, the court said, page 159: "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." The above was said in a case which held a statute of Texas to be unconstitutional, which gave a preferential right to certain claims against railroad corporations. It was a statute which in effect

gave certain creditors of the railroad corporation advantages over other creditors of the same corporation. It is not separable in principle from the case at bar, which, by its discriminations, gives preference to *certain* favorite depositors over *other* depositors and against *creditors* of banking corporations.

In *Storck v. Baltimore City, et al.*, 101 Md., 476, the court said: "Classification must be natural and not arbitrary. Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." The above was said with reference to a statute of Maryland which gave one class of property owners the privilege of erecting steps on the sidewalk and denied the same privilege to another class of property owners. So in the case at bar. The Kansas Bank Guaranty Law permits certain banks to enjoy the privilege of becoming guaranteed banks and denies to other banks the same privilege.

We need hardly hark back to what we have said in a previous chapter to the point that no sound reason can be given for the classifications and distinctions and discriminations between the different kinds of depositors, to-wit: general depositors, savings bank depositors, time certificate depositors, depositors in guaranteed banks and depositors in non-guaranteed banks; *all* found in a law *primarily enacted, as defendants say, for the security of the depositors*. How can such a classification and discrimination be sustained in the light of what was said in the *Ellis* case, *supra*? Mr. Justice Brewer concluded his analysis of the doctrine as follows: "It is apparent that the *mere fact* of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, *and that in all cases it must appear* not only that a classification has been made, but *also that*

*it is one based upon some reasonable ground*—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained.”

The court will note that we have italicized a phrase in the above quotation to emphasize our suggestion that it “must appear” that the classification is based on some reasonable ground; that it must appear that the classification is not a “*mere arbitrary selection.*” Said language does not mean that the court will necessarily infer that the classification is reasonable and not arbitrary unless the contrary appear, but it must appear to the court that the classification is reasonable and not arbitrary. So in the case at bar we put the query, *wherein and how does it appear in this record that the classifications and discriminations are reasonable and not arbitrary?*

*Bonnett v. Vallier*, 136 Wis., 193, is a case where the court held a statute of Wisconsin, relating to the construction of tenement houses, to be unconstitutional. In said case the court noted that there was a distinction between the word “*reasonable*” as applied to police regulations and the word “*expediency.*” The question of expediency vested discretion in legislation, but to be “*reasonable*” required something more than mere expediency. So in that case the court held that the statute relating to tenement houses was not reasonable and adjudged it to be void and unconstitutional.

*The unwarranted and arbitrary discriminations in favor of depositors and against the complainant banks as creditors, and the complainant state banks which cannot become guaranteed banks, or are not guaranteed banks is a denial to them of the equal protection of the laws.*

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79, Mr. Justice Brewer quoted from the *Ellis* case, beginning with the phrase, "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this," and concluded on that point, "No duty rests more imperatively on the court than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of government." Again, commenting on a decision of the Supreme Court of Kansas, said, page 109: "So we have the clear declaration of the Supreme Court of Kansas that legislation by which one individual or even one set of individuals is selected from others doing the same business in the same way and subjected to regulations not cast upon them, is a discrimination forbidden by the constitutional provision which obtains both in the Constitution of Kansas and in that of the United States to the effect that the equal protection of the laws is guaranteed to all." Again the court said, p. 112: "This statute is not simply legislation which in its *indirect* results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

The above quotations from the *Cotting* case are particularly appropriate to the discrimination which prohibits banks that do not have 10% surplus from becoming guaranteed banks and which excludes the depositors in such banks from the benefits of the guaranty provisions.

The said discrimination in the banking act can have no basis for its support except it be measured either by the extent of the business or the earning capacity of the bank. It is not based on the capitalization. It is discrimination based on profits of the bank. The principle is the same as that which the Supreme Court applied in holding the Stock Yards Act to be unconstitutional.

The same principle of law was announced in *Sayre Borough v. Phillips*, 148 Pa. St., 482, (33 Am. St. Rep., 842), where a license law passed by the legislature was held to be unconstitutional because it discriminated between classes: "If a statute, or a municipal ordinance, is in reality directed only against certain persons who are engaged in a given business, or against certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance is *not a police*, but a *trade regulation*; and it has no right to shelter itself behind the police power of the state or the municipality." \* \* \* "The present question is whether, under the pretense of police control, trade may be regulated in the interest of resident dealers by making the same business a lawful one to all who live on one side of a municipal line, and an unlawful one to all who live on the other side. We are very clear in our convictions that this cannot be done, and for this reason the judgment is affirmed."

What was said in the last case, *supra*, was in condemnation of a statute which made discriminations between persons engaged in the same trade or same business and similarly situated except that it licensed some and excluded others without any good reason therefor. If the statute had been directed against the *business* it should have applied to *all* engaged in the same business.

But because instead of being directed against the business it was directed against the *persons* it was held not to be *within the police power*. So in the case at bar the statute *selects* the depositors who are to be secured and *excludes* other depositors and it excludes *creditors* who are not among the class of favorite depositors. If the statute is to be construed as a regulation of banks it is equally faulty because, under the general banking laws of the State of Kansas, there are over seven hundred state banks. It selects out of the seven hundred for a bestowal of its benefits the banks which have a surplus of 10%, and those which obtain the consent of their stockholders and directors, and those which do not pay interest exceeding 3% on deposits, etc., and excludes from its benefits and privileges all other banks.

In *State v. Mitchell*, 97 Mo., 66; 53 Atl., 887; 94 Am. St. Rep., 481, the court declared unconstitutional a statute relating to hawkers and peddlers and, among other things, said, page 483: "If there be no real difference between the localities, or business, or occupation, or property, the state cannot make one in order to favor some persons over others." \* \* \* "The inhibition of the Fourteenth Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designated to prevent any person or class of persons being singled out as a special subject for discriminating and favoring legislation."

So we say in the case at bar unless some *real difference* can be pointed out why depositors in one bank or class of banks *shall be guaranteed*, and depositors in other banks *shall not be guaranteed*, and why some *classes* of banks may become guaranteed banks and other *classes* of banks *shall not be guaranteed*, the Kansas Bank Guaranty Law is unconstitutional and void.



## X.

ONE OF THE PRIMARY PURPOSES OF THE KANSAS BANK GUARANTY LAW IS TO TAKE THE PROPERTY OF CERTAIN BANKS AND APPROPRIATE THE SAME TO PAY THE PRIVATE CLAIM OF AN INDIVIDUAL AGAINST SOME OTHER BANK AND WITH WHOM THE CONTRIBUTING BANKS SUSTAIN NO OBLIGATION, MORAL OR CONTRACTUAL. IT IS THE TAKING OF THE PROPERTY OF ONE PERSON TO PAY THE PRIVATE DEBTS OF ANOTHER, HENCE IS UNCONSTITUTIONAL.

The taking of property of one person and giving it to another in payment of a private claim is taking property without due process of law and is a denial of the equal protection of the laws and cannot be justified under the police power of the state. *Dobbins v. Los Angeles*, 195, U. S., 223-237; *Crescent Liquor Co. v. Platt*, 148 Fed. 894-898; *The Alma Coal Co. v. Cozad*, 79 Ohio St., 344; *Loan Association v. Topeka*, 20 Wall., 655; *State v. Osawkee Township*, 14 Kan., 418; *Lowell v. Boston*, 111 Mass., 454; *Baltimore & Eastern etc. Ry. Co. v. Spring*, 89 Md., 510; *Mo. Pac. Ry. v. Nebraska*, 164 U. S., 403; *Dodge v. Mission Tp., Shawnee Co., Kans.*, 107 Fed., 827; *Lucas Co. v. State*, 75 Ohio St., 114; *State v. Froehlich*, 118 Wis., 129; 99 Am. St. Reps., 985; *William Deering & Co. v. Peterson*, 75 Minn., 118; *State v. Switzler*, 143 Mo., 287; 65 Am. St. Rep., 653.

In *Loan Association v. Topeka*, 20 Wall., 655, Mr. Justice Miller said, p. 664: "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not

legislation. It is a decree under legislative forms." And again on p. 665: "If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the baker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

In *First State Bank v. Shallenberger*, 172 Fed. 999, which involved the constitutionality of the Nebraska Bank Guaranty Law, *Van Devanter*, Circuit Judge, and *Munger*, District Judge, speaking to the precise point under consideration, said, p. 1002:

"It is apparent that the effect upon the community of the insolvency of banks can differ only in degree, and not in kind, from the effect of the insolvency of any other debtor. In fact, the failure of large railway, insurance, mercantile, or manufacturing companies may, and often does, more profoundly affect the business community than the failure of a small bank.

"If the state possesses the power to single out a certain form of business activity and to compel the citizen who engages in it to pay the losses of strangers, whose only relation to him is that their business is known by the same general name, why may it not require all those engaged in one occupation to pay the losses of those engaged in other occupations? And if the state may require those of one class to contribute to the losses of the same class, it is but a step further to require the fortunate to bear the financial losses of the less fortunate as often as inequality of fortune may arise. The provis-

ions relating to the depositors' guaranty fund cannot be sustained on the theory that society is discharging an obligation it owes to those pauper and dependent classes who have always been regarded as proper subjects of its bounty and care. The creditors of banks are like the creditors of any other debtor, and this act is not confined to the relief of paupers; but payment is required to all depositors, whatever their financial condition may be." \* \* \*

"It is needless to review at length the many cases which hold to the same effect. See *Parkersburg v. Brown*, 106 U. S., 487, 491, 1 Sup. Ct. 442, 27 L. Ed. 238 (bonds to aid manufacturers); *Cole v. La Grange*, 113 U. S., 1, 9, 5 Sup. Ct. 416, 28 L. Ed. 896 (bonds to aid manufacturers); *Dodge v. Mission Tp.*, 107 Fed., 827, 832, 46 C. C. A. 661, 54 L. R. A. 242 (bonds to aid manufacturers); *Allen v. Inhabitants*, 60 Me., 124, 11 Am. Rep. 185 (bonds to aid manufacturers); *Coates v. Campbell*, 37 Minn., 498, 35 N. W., 366 (bonds to aid manufacturers); *Lowell v. Boston*, 111 Mass., 454, 15 Am. Rep., 39 (bonds to aid sufferers from Boston fire); *Patty v. Colgan*, 97 Cal., 251, 31 Pac. 1133, 18 L. R. A. 744 (aid to flood sufferers); *Lucas County v. State*, 75 Ohio St. 114, 135, 78 N. E. 955 (annuities for the blind); *Wisconsin Keeley Institute Co. v. Milwaukee Co.*, 95 Wis., 153, 70 N. W. 68, 36 L. R. A. 55, 60 Am. St. Rep. 105 (bounty to private inebriate hospital); *State v. Froehlich*, 118 Wis., 129, 94 N. W. 50, 61 L. R. A. 345, 99 Am. St. Rep. 985 (bounty to private inebriate hospital); *State v. Switzler*, 143 Mo., 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653 (bounty to students attending state university); *Kingman v. City of Brockton*, 153 Mass., 255, 26 N. E. 998, 11 L. R. A. 123 (aid in erection of building for Grand Army post); *State v. Osaukee Tp.* 14 Kan., 418, 19 Am. Rep. 99 (furnishing seed grain to farmers); *Deering & Co. v. Peterson*, 75 Minn., 118, 77 N. W. 568 (appropriation to purchase seed grain for those without crops); *Deal v. Missis-*

*Mississippi County*, 18 S. W. 24, 107 Mo. 464, 14 L. R. A. 622 (bounties to growers of trees); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U. S., 403, 17 Sup. Ct. 130, 41 L. Ed. 489 (taking of railway right of way for private elevator), *Atchison, T. & S. F. Ry. Co. v. Campbell*, 61 Kan., 439, 59 Pac. 1051, 48 L. R. A. 251, 78 Am. St. Rep. 323 (free tickets to stock shippers); *Harp v. Choctaw, O. & G. Ry. Co.* (C. C.) 118 Fed. 169 (compelling building of spur track to coal mine); *Ornard Beet Sugar Co. v. State of Nebraska*, 73 Neb., 57, 66, 68, 102 N. W. 80, 105 N. W. 716 (bounty for growers of sugar beets); *Michigan Sugar Co. v. Dix*, 124 Mich., 674, 83 N. W. 625, 56 L. R. A. 329, 83 Am. St. Rep. 354 (bounty for growers of sugar beets); *Minnesota Sugar Co. v. Iverson*, 91 Minn., 30, 97 N. W. 455 (bounty for growers of sugar beets)."

## XI.

**THE KANSAS BANK GUARANTY LAW IMPAIRS THE OBLIGATION OF CONTRACTS IN ALL CASES WHERE COMPLAINANT BANKS HAVE LOANED MONEY TO, REDISCOUNTED BILLS FOR, OR OTHERWISE BECAME CREDITORS OF GUARANTEED BANKS. ALSO AS TO ALL CREDITORS OF SUCH BANKS WHO ARE NOT WITHIN THE GUARANTY PROVIDED BY SECTION 6.**

No state shall pass any "law impairing the obligation of contracts." (Section 10, Art. 1, Constitution.) The obligation of a contract in the constitutional sense includes the right to have the contract enforced, and, that no statute which tends to postpone or retard the enforcement of the contract for the benefit of others and which discriminates against such right of enforcement is constitutional. *People v. Common Council*, 140 N. Y., 300, *Barnitz v. Beverley*, 163 U. S., 128, *Western National*

*Banks v. Reckless*, 96 Fed. 77, *Peninsular Lead, etc., Works v. Union Oil, etc., Co.*, 88 Fed., 777.

It has been ruled that an act is unconstitutional which changes the remedy unless it supplies an alternative remedy equally adequate and efficacious. *People ex rel v. Common Council*, 140 N. Y., 300. *McGahey v. Va.*, 135 U. S., 662-693.

Statutes which seriously impair the remedy which existed at the time the contract was entered into, "impair the obligation" of the contract within the meaning of the constitution. *Hawthorne v. Calef*, 2 Wal., 10. *Louisiana v. New Orleans*, 102 U. S., 203. *Seibert v. Lewis*, 122 U. S., 284.

In *Louisiana v. New Orleans*, *supra*, the court said, pp. 206-7: "The obligation of contract, in the constitutional sense, is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The latin proverb, *qui cito dat bis dat*—he who gives quickly gives twice—has its counterpart in a maxim equally sound, *qui serius solvit, minus solvit*—he who pays too late, pays less. Any authorization of the *postponement of payment*, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition."

In view of the law in cases cited *supra*, what justification can be urged in favor of the provisions of the Kansas Bank Guaranty Law which authorize the bank examiner to take *all of the assets* of the bank including the money realized from the stockholders and appropria-

ting the same first in *payment* of the amount due on the certificate issued to favorite *depositors* including 6% interest thereon to the exclusion of all other creditors. The complainant banks have a right to the enforcement of the remedy as it existed at the time when they made their contract of loans. When these loans were made under the general banking law of Kansas all creditors shared pro-rata. The constitution says that the state of Kansas shall not pass a law which destroys or impairs that remedy.

## XII.

**THE RULING OF THE CIRCUIT COURT THAT COMPLAINANT BANKS WERE NOT IN A POSITION TO COMPLAIN OF THE UNLAWFUL DISCRIMINATIONS, OR TO INSIST THAT THE GUARANTY DEPOSIT LAW WAS UNCONSTITUTIONAL ON THE SUGGESTION THAT COMPLAINANT BANKS MIGHT BECOME GUARANTEED BANKS AND THEREBY BE PUT ON AN EQUALITY WITH OTHER GUARANTEED BANKS IS UNSOUND.**

### **IT OVERLOOKS THE POINTS AT ISSUE.**

On this point Pollock, J., said, rec. p. 46:

“In so far as complainants qualified to accept the provisions of the Act, but decline to do so, I see no just cause on their part to complain of discrimination against them. If any are discriminated against by the terms of the act, the privileges of which they may accept, and they decline to do so, it is their failure to accept, and not the law, which causes the injury, and they will not be heard to complain. As to those complainants disqualified from participating in the benefits of the act, it is not shown the condition which produces this disqualification may not be changed by such banks and the provisions of the act then accepted. If so, such of complainants may not be heard to contend of the law’s dis-

crimination against them, for, in such case, it is not the law, but the facts constituting the disqualifying conditions which produces the discrimination."

*What was said by Pollock, J., overlooks the questions at issue—also loses sight of the fact that complainant banks can not become guaranteed banks with agreeing that their assets may be taken from them to pay the debts of an other bank, and without compensation.*

*First.* If each of the complainant banks could and did become guaranteed banks it would not necessarily follow that all of the 700 banks in the state would become guaranteed banks, and if not, there would still remain all the discriminations which exist between guaranteed and non-guaranteed banks, and between deposits in guaranteed and non-guaranteed banks, and between depositors in the same bank, and between depositors and creditors in all banks, and complainant banks would remain affected by these conditions.

*Second.* Complainant banks owe a duty to their depositors and to their creditors alike; that is, that all classes of banks' creditors shall have the equal protection of the laws in the collection of their claims in case of insolvency of the bank. Should the complainant banks become guaranteed they would thereby be required to accept of the provision in the Bank Guaranty Deposit Law by which certain of their depositors should become the favorites of the law to the exclusion of other depositors in the same bank and to the exclusion of its creditors as distinct from depositors.

If complainant banks become guaranteed banks it would subject them to the obligation of the law by which, if they borrowed money from other banks, or made bills payable to other banks, or issued their bills of exchange

to other banks, or rediscounted paper with other banks, that all of said obligations should be postponed in payment until after the assets should first be appropriated to the payment of the favorite depositors under the guaranty deposit law.

Complainant banks as now situated are being conducted under the general banking law of the state of Kansas, which declares equality to all depositors and all creditors, without discrimination against any and without favorites. Complainant banks may become guaranteed banks, only by an agreement upon their part to submit to these unlawful, unreasonable and unconstitutional discriminations? *Is it to be said as a principle of sound law that a citizen or a bank can not be heard to complain of the unlawful and unconstitutional discriminations in a law, because, forsooth, he may put himself into a class to which the said discriminations belong?*

*Third.* If all of the incorporated banks in the state should become guaranteed banks there still would remain all the discriminations which exist between depositors, and between depositors and creditors, and between private banks and trust companies and guaranteed banks, and by reason of the ramifications of the banking business, complainant banks would still be subjected to said unlawful discriminations in their dealings with private banks and trust companies, and likewise for checks accepted, drafts cashed, money loaned and paper rediscounted in their dealings with guaranteed banks.

*Fourth.* Thirteen of the complainant banks do not have a surplus fund equal to 10% of their capital stock, (rec. p. 11) and although duly authorized and chartered to do a banking business under the general banking laws of the State of Kansas cannot become guaranteed banks.



Is it to be said that said thirteen banks cannot be heard to complain of the unlawful and unconstitutional discriminations in the Bank Deposit Guaranty Law by the suggestion that it was simply a misfortune of the said banks that they do not have the 10% surplus? Has not a bank, which does not have a 10% surplus, the same right to protect its depositors and its creditors that a guaranteed bank has? Have not the depositors in a bank, which does not have 10% surplus, the right to as favorable consideration and treatment under the law as a depositor in a bank which has more than 10% surplus? It is not the fault of the depositor that the bank does not have a 10% surplus. The Kansas Bank Guaranty Deposit Law puts depositors in one bank in one class and depositors in another bank in another class. One of the distinctions in this classification is, that one bank does not have a 10% surplus and another bank has a 10% surplus. Said discriminations and classifications exist, even though both banks are on the same street of the same city and the depositors inhabitants of the same locality.

*Fifth.* Is it to be said that complainant banks have no right to ask to have the unconstitutional Bank Guaranty Deposit Law enjoined, for the reason, suggested in the Circuit Court, that the complainant banks themselves may become guaranteed banks, *when the doing so would subject the complainant banks to make the deposit with the State Treasurer of \$500 for each \$100,000 capitalization, and likewise subject them to submitting to the taking of their assets to pay the private debts of another bank?* If it be unconstitutional to take the money of one citizen, or of one bank, and appropriate the same to some other citizen or some other bank as a gratuity, has not the citizen or the bank whose money is thus to be taken

a right to complain? Is it an answer to say that the citizen or the bank whose money is thus wrongfully to be taken that he *may submit* to the taking and therefore he has no standing in a court of equity to enjoin the enforcement of such unconstitutional law?

*Sixth.* The complainant banks are depositors in and creditors of other State banks. If complainants become guaranteed banks they must agree to submit to the terms of the guaranty deposit law by which they cannot collect from other banks that which may be owing to them on checks cashed, drafts purchased, bills re-discounted or money loaned *until after all depositors of said other banks shall be first paid in full*. Is it to be said that complainant banks have no right to enjoin this unconstitutional law by the suggestion that they may voluntarily subject themselves to these unlawful and unconstitutional discriminations against them? The complainant banks are before the court insisting upon their property rights just as a citizen has a right to insist upon his property rights. Is it correct to say that a citizen or a bank cannot obtain the permission of the state to carry on a particular business *until he first binds himself to submit to a taking from him of his legal and constitutional rights* to the equal protection of the laws, and that his property shall not be taken from him except by due process of law? A citizen or a bank *may voluntarily do this*, but if he does not want to do so, is he without standing in a court of equity?

*Seventh.* The question of jurisdiction of the court or the right of the complainant banks to challenge the unconstitutionality of the Kansas Bank Depositors Guaranty Law does not depend alone upon the discriminations in the statute, *but depends also upon the other facts,*

*to-wit: that this law takes from the banks which submit to it their property (a part of their assets) and appropriates the same as a gratuity to a private creditor of some other bank.* This wrongful and unlawful taking of property from one person and giving it to another is sufficient to confer jurisdiction. The case of *Loan Association v. Topeka*, 20 Wall., 655, sustains the jurisdiction in the case at bar, and other like cases cited in Chap. X. of this brief sustain the jurisdiction in the case at bar. The case of *Merchants' Bank v. Pennsylvania*, 167 U. S., 461, is inapplicable to the facts in the case at bar.

*Eighth.* If the ruling of *Pollock J.*, is right, then the complainant banks must either *submit to the discriminations* against them as banks, and against them as *creditors* of other banks, or take the *alternative* of having a part of their assets taken from them without compensation and appropriated to a private use. There is nothing in *Merchants Bank v. Pennsylvania*, 167 U. S., 461, that denies the right of the complainant banks to appeal to the court for a protection of their constitutional rights under the facts existing in the case at bar.

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# In the Supreme Court of the United States.

THE ASSARIA STATE BANK, OF ASSARIA, THE  
CITIZENS BANK, OF AXTELL, *et al.*, *Appellants*,  
*vs.*

JOSEPH N. DOLLEY, as Bank Commissioner of the  
State of Kansas, and MARK TULLEY, as Treasurer of  
the State of Kansas, *Appellees*.

No. 617.

## BRIEF OF APPELLEES.

### PROPOSITIONS DISCUSSED.

1. The Kansas bank guaranty law is a voluntary law and applies only to those who seek and obtain admission to its benefits, and therefore cannot "constitute a taking of property without due process of law," or a denial of the "equal protection of the laws."

Merchants Bank v. Pennsylvania, 167 U. S. 461.

Commonwealth v. Merchants Bank, 168 Pa. St. 309.

2. The appellant banks have not presented by their bill such a state of facts as will work a justiciable injury to them.

Supervisors v. Stanley, 105 U. S. 305.

Clark v. Kansas City, 176 U. S. 114.

Smiley v. Kansas, 196 U. S. 447.

Merchants Bank v. Pennsylvania, 167 U. S. 461.

Commonwealth v. Merchants Bank, 168 Pa. St. 309.

Turpin v. Lemon, 187 U. S. 51.

Branton Co. v. W. Va., 208 U. S. 192.

State v. Smiley, 65 Kan. 240.

Marbury v. Madison, 1 Cranch 137.

Tyler v. Registration, 179 U. S. 405.

3. The appellants, being all citizens of the state of Kansas, have not presented a state of facts which raises a controversy under the constitution of the United States.

Metcalf v. Watertown, 128 U. S. 586.

Tennessee v. Planters Bank, 152 U. S. 454.

Blackburn v. Portland Mining Co., 175 U. S. 571.

4. The banking business is a public business, and its regulation is within the police power of the state.

Freund on Police Power, secs. 400, 401.

Tiedeman on Limitations, sec. 194.

Blaker v. Hood, 53 Kan. 499.

State v. Richcreek, 5 L. R. A., n. s., 878, 77 N. E. 1085.

Bank of Augusta v. Earle, 13 Pet. 519.

Zane, Banks and Banking, secs. 8 and 9.

Morse on Banking, sec. 13.

Bank v. San Francisco, 142 Cal. 246.

5. The Kansas bank guaranty law is a regulation of banking and is a proper exercise of the police power of the state.

Freund on Police Power, sec. 400.

Gundling v. Chicago, 177 U. S. 183.

Lawton v. Steele, 152 U. S. 133.

Marbury v. Madison, 1 Cranch 137.

Otis v. Parker, 187 U. S. 606.

Chi. B. & O. v. People, 200 U. S. 561.

Powell v. Penna., 127 U. S. 678.

THIS suit was brought by the complainants, who are forty-seven state banks incorporated under the laws of the state of Kansas.

The legislature of the state of Kansas, at the session of 1909, enacted a law known as the bank depositors' guaranty law, which was an act providing for the security of deposits in the incorporated banks of Kansas,

creating the bank depositors' guaranty fund of the state of Kansas, and providing regulations therefor and penalties for the violation thereof. This law we give in full in appendix to this brief.

The complainants filed their bill in the Circuit Court of the United States for the district of Kansas against the defendants for the purpose of testing the constitutionality and validity of this law, asking the court to enjoin the defendants from putting the law into operation. This bill was filed on the 14th day of September, 1909. The defendants, upon September 29, 1909, filed their demurrer to this bill. (Rec. 36.) The issues so joined upon the complaint and demurrer were argued by counsel and were submitted to the court on arguments and briefs, and thereafter, and on the 23d day of December, 1909, the court, by JOHN POLLOCK, Judge, who heard the case, sustained the demurrer of the defendants to the complainants' bill and handed down a memorandum of decision thereon. (Rec., pp. 41-92.) The case was brought by the banks to this court. So much of the decision of the court as treats of this case we have printed in this brief. In the decision Judge POLLOCK made a statement of the material averments of the complainants' bill. He said:

"In case No. 8816, in which the Assaria State Bank and forty-six other state banks are complainants, and the treasurer and bank commissioner of the state are defendants, it is averred at and before the passage of the act in question complainants were organized, qualified and doing a banking business under and in pursuance of the laws of the state, in the several different portions of the state where located. That in pursuance of the laws under which they were created and doing business prior to the passage and taking effect of the act in question, their shareholders were liable, in addition to the money represented by their shares, to an amount equal to the par value thereof to the creditors of the bank. That a part only of complainants are qualified to accept the terms of the act. That complainants are taxpayers of the state, and a large amount of the funds so collected from complainants by

taxation, forming a part of the general revenue fund of the state, is being employed by defendants in carrying into effect the act in question, but that no complainant has been required to or will pay into such fund to be so used the sum of two thousand dollars. That it is the object, purpose and intent of defendants, as officers of the state, to require all qualified banks to accept the provisions and obligations of the act. That many banks of the state are accepting its provisions. That more than seven hundred in number are qualified to accept under the provisions of the act. That those of complainants who are not qualified, and all complainants that are qualified but refuse to accept the provisions of the act, will be by the operation of the law, and the business advantages possessed by banks under the law, driven out of business and compelled to suspend operations. That as to each of the complainants, the right to continue in business, which will be thus destroyed, is of a value in excess of two thousand dollars. That complainant banks are depositors in other banks of the state in large amounts, that have accepted the provisions of the act, or, being qualified, threaten to accept such provisions, and that the operation of the law discriminates against complainants. That the act in question is violative of the constitution and laws of the United States, and the provisions of the constitution of the state as well, in respects hereinafter stated. Wherefore, a decree is prayed declaring the act in question invalid and void, and restraining defendants from enforcing its provisions."

We do not attempt to improve on this statement made by the court. In the opinion the court considered and decided three cases submitted upon demurrers to three separate bills, and wrote but one opinion. We here segregate that portion of the opinion relating to this case; and, proceeding, the court said:

"In regard to the averments of the bill of complaint in case No. 8816, considered for the purpose of determining its sufficiency to confer jurisdiction on this court to inquire as to the validity of the act in question, it may be observed, in the first instance, it is wholly immaterial to complainants whether the act be constitutional and valid or unconstitutional and invalid in its scope, operation or effect in its relation to others.

Before complainants may be heard to complain they must show by the averments of their bill such a state of facts existing or threatened as will work a justiciable injury to themselves. (Supervisors v. Stanley, 105 U. S. 305; Clark v. Kansas City, 176 U. S. 114; Smiley v. Kansas, 196 U. S. 447.) As in the present case the parties are each and all citizens of this state, it matters not how much injury may come to complainants by the enforcement of the act, even if it be unconstitutional in matters averred in violation of the provisions of the constitution of the state, for such matters are exclusively for the consideration and determination of the courts of the state, unless, in addition thereto, the bill presents a state of facts which, in good faith, raises a controversy as to the validity of the act arising under the constitution and laws of the United States, the decision of which controversy may be determinative of the case. (Metcalf v. Watertown, 128 U. S. 586; Tennessee v. Union and Planters' Bank, 152 U. S. 454; Blackburn v. Portland Gold Mining Co., 175 U. S. 571.)

"Examined in the light of these principles, do the averments of the bill of complaint in case No. 8816 present a controversy arising under the constitution and laws of the United States, in which controversy there is involved an amount sufficient to confer jurisdiction on this court?

"As seen from the statement made, complainants were corporations of the state, duly organized and doing a banking business within the state at and prior to the date of the passage and taking effect of the act in question. That a part only of complainants are qualified to accept the conditions imposed and receive the benefits of the act in question. That prior to the passage of this act their shareholders were liable only to creditors of the bank to the amount paid for the shares, and in addition the face value of the shares. That if complainants shall accept the provisions of the act they will impose an additional burden on their shareholders to contribute for losses sustained by depositors in other institutions. That as to those of complainants qualified to accept the provisions of the act, which do not accept, and those disqualified, the advantage obtained by those institutions which do accept the provisions of the act will destroy the business of complainants, the value of the right to continue which exceeds in amount that necessary to confer jurisdic-



tion on this court. That complainants, in common with other citizens, taxpayers of the state, have been compelled by taxation to contribute to the general revenue fund of the state, which is being employed by defendants to carry the act into operation. That complainants are depositors in and creditors of other state banks which have accepted the conditions and obligations imposed by the act, and that the operation of the act in settling the affairs of such other banks will unjustly discriminate against complainants as creditors of such other banks, and will impair the obligation of complainants' contracts with such banks.

"In so far as complainants are qualified to accept the provisions of the act but decline to do so, I see no just cause on their part to complain of discrimination against them. If they are discriminated against by the terms of the act, the privileges of which they may accept, and they decline to do so, it is their failure to accept, and not the law, which causes the injury, and they will not be heard to complain. As to those complainants disqualified from participating in the benefits of the act, it is not shown the condition which produces this disqualification may not be changed by such banks and the provisions of the act then accepted. If so, such of complainants may not be heard to contend of the law's discrimination against them, for, in such case, it is not the law, but the facts constituting the disqualifying conditions, which produces the discrimination. This clearly appears from a consideration of the case of *Merchants' Bank v. Pennsylvania*, 167 U. S. 461, wherein Mr. Justice BREWER, delivering the opinion, said:

"If it be said that a lack of uniformity renders the statute obnoxious to that part of the fourteenth amendment to the federal constitution which forbids a state to 'deny to any person within its jurisdiction the equal protection of the laws,' it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all banks shares, where state or national, rests the ordinary state tax of four mills. To every bank, state or national, and all alike, is given the privilege of discharging all tax obligations by collecting from its stockholders and paying eight mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and whose stock is only worth par. So it is impossible, under the operation of this law, that one bank may pay at a less rate upon the actual value

of its banking property than another; but the banks which do not make this election, whether state or national, pay no more than the regulation tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the federal constitution.

"Again, it will be perceived that this inequality in the burden results from a privilege offered to all, and in order to induce prompt payment of taxes, and payment without litigation. To justify the propriety of such inducement, we need look no further than the present litigation."

"In so far as the bill avers the misapplication of the revenues of the state raised from complainants and others by taxation, while it is true by reason of the provisions of chapter 334, Laws of 1905, an injunction may be granted to restrain the illegal levy of any tax, charge, or assessment, or any proceeding to enforce the same, and that an injunction may be granted to restrain any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge, or assessment, and that any number of persons whose property may be affected by any tax or assessment so levied, or whose burden as taxpayers may be increased by the threatened unauthorized contract or act, may unite in a suit to obtain such relief; and while in a proper case the statutory right of suit here granted might be asserted in this court, yet it is clear, as between citizens of this state, such right cannot be enforced here even if the value of the rights sought to be protected were sufficient to confer jurisdiction on this court, for such controversy does not arise under the constitution and laws of the United States.

"In so far as it is averred in the bill, by the operation of the act in question, the rights of complainants, as depositors and creditors of other state banks which have accepted or threaten to accept the provisions of the act, are discriminated against and their contract rights impaired, it will be noticed it is not averred any such guaranteed bank in which any complainant has a deposit or credit has failed or its affairs are about to be settled under the provisions of the act, hence, of necessity, the protection sought against that feature of the act, under the averments of the bill at this time, rests in mere speculation, and is based on no tangible rights of complainants. If such event shall transpire in future, and this feature of the act of which complaint

is made shall be attempted to be enforced, to the impairment of the contract rights of any complainant, a controversy of merits may then arise, but such controversy is not presented by the bill in question.

"It follows, the demurrer based on want of jurisdiction in case No. 8816 must be sustained. And unless complainants, being so advised by their solicitors, shall amend their bill of complaint by the January, 1910, rules of this court, the bill will stand dismissed for want of jurisdiction."

At the same time the bill was filed in this case, the same solicitors filed a bill in the same court for one hundred and fifty national banks transacting business in Kansas as complainants. Upon demurrer being filed to this bill, District Judge POLLOCK overruled the demurrer and granted an interlocutory injunction on the theory that the bill conferred jurisdiction upon the court because the construction of the national banking laws was involved. On appeal from this order to the circuit court of appeals of the eighth circuit, the case was heard by Circuit Judges HOOK, VAN DEVANTER, and ADAMS, and in an opinion written by Judge HOOK, unanimously agreed to by the court, the decision of the circuit court was reversed and the validity of the law sustained. Many of the questions considered in that case are involved in this suit, and the opinion, therefore, is entitled to great consideration upon those questions. J. N. Dolley, as Bank Commissioner of the State of Kansas, *et al.*, v. Abilene National Bank, of Abilene, *et al.*, 179 Fed. Rep. 461.

In its statement of the case the court said:

"The questions before us require no more than a brief outline of the provisions of the statute. There are many details of the guaranty scheme of which much complaint is made, but we think they are so clearly matters with which the national banks have no legal concern, or are so manifestly within the legislative province of the state, it is unnecessary to mention them. The statute authorizes banks incorporated under the laws of the state and possessing prescribed qualifications to join in contributing to and maintaining a fund for securing certain classes of their depositors against

loss. The administration of the law is committed to the bank commissioner, the custody of the fund to the state treasurer. Whether a bank shall become a party to the scheme is optional, not compulsory. Its desire to join is signified by a resolution of its board of directors authorized by its stockholders. If upon an examination of its affairs by the bank commissioner it is found to be qualified, it then contributes to the permanent guaranty fund a sum in bonds or cash proportioned to the deposits to be guaranteed and receives a certificate that it has complied with the provisions of the act and "that its depositors are guaranteed by the bank depositors' guaranty fund of the state of Kansas." The permanent fund is raised to a fixed amount by the initial payments and, if necessary, by annual assessments of one-twentieth of one per cent of the guaranteed deposits in each bank, less capital and surplus; and any depletion of the fund caused by payments to depositors in insolvent banks is cared for by like assessments, not exceeding five in any calendar year. When a guaranteed bank, so-called, becomes insolvent, the bank commissioner takes charge, winds up its affairs, and applies its assets and the moneys realized from the liability of its stockholders. When these are exhausted, balances still due guaranteed depositors are paid in full from the guaranty fund if it is sufficient, and if not, then by continued assessments, not exceeding five annually, as above stated, upon all banks which are parties to the plan. It is also provided that national banks may avail themselves of the act upon compliance with the prescribed conditions.

"In their final analysis the objections of the national banks to the Kansas statute are reduced to two propositions: First, . . . ; and, second, that the effect of the guaranty plan will be to attract depositors from the national banks to the guaranteed state banks, and will, therefore, impair the efficiency of the former as instrumentalities of the national government. Counsel admit this to be their position. The federal questions presented by these propositions constitute the ground of jurisdiction of the circuit court, and upon their soundness rests the temporary injunction it granted."

In considering the classifications made by the law, the court said:

"The equality clause of the amendment does not re-

quire indiscriminate operation of state laws, but proceeds upon due consideration of the relations of persons to the state and to the legislation in question. 'It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liability imposed.' (Maggoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Home Insurance Company v. New York, 134 U. S. 594; Hayes v. Missouri, 120 U. S. 68.)

"In *Barbier v. Connolly*, 113 U. S. 27, it was said: 'Class legislation discriminating against some and favoring others is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment.' Such has been the consistent holding of the supreme court. This is not the ordinary case of classification for legislative purposes. The power of a state to classify implies jurisdiction of the various objects to be classified, and the voluntary selection of some of them for inclusion within the law. Even in such cases a classification when made will be upheld whenever it is not purely arbitrary or capricious but proceeds upon some difference which has a just and reasonable relation to the purpose sought to be accomplished. (*Railway Co. v. Ellis*, 165 U. S. 150.) . . . A state has the right to confer corporate powers upon its own corporations, and its action cannot be held in contravention of the equality clause of the fourteenth amendment merely because like corporations of the United States cannot, by reason of their organic structure and the duties they owe their creator, avail themselves of them. The State of Kansas did not single out national banks as the special object of hostile or discriminative legislation, and no such conclusion can be helped out by averments of intention in a bill of complaint."

In considering the indirect effect of the law upon the business of the national banks, as well as banks which do not belong to the guaranty fund, and the right of such institutions to be heard in a suit in equity, the court said:

"The effect of the Kansas statute upon the business

of the national banks will at the most be indirect and incidental. Whether there will be any appreciable effect at all depends upon the individual views of depositors which ordinarily are influenced by many things pertaining to banks and bankers and their methods of conducting business. There can be none in a legal sense of which a court can take cognizance in a case like this. Ground for complaint would exist if the statute had, for instance, made it an offense to deposit funds in national banks or subjected them to a higher rate of taxation than that imposed on like deposits in state institutions, or in some other perceptible way had evinced an evil and discriminating purpose, or an attempt to subject them to rules consistent with those prescribed by Congress. . . . We have not considered the merits of the guaranty plan, whether practically beneficent, experimental or illusory. Such matters are for the state legislature; our province is confined to the question whether the exercise of its power is within constitutional limits so far as the national banks are concerned. We think the objections they urge are so clearly without foundation the temporary injunction was improvidently granted."

## ARGUMENT.

As the hearing occurred on a demurrer to the bill, there was nothing involved except a consideration of the statute in question and the interest of the complainants as affected by the statute. We will first consider matters in the bill which may or may not be admitted by the demurrer.

It is well established in courts of equity that the demurrer admits all facts which are well pleaded. The converse of this statement must also be true, and we quote from two of the leading cases decided by this court the rule controlling upon this question. In the early case of *Dillon v. Barnard*, 21 Wall. 430, the court said :

"A demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument when the instrument itself is set forth in the bill or a copy is annexed, against a construction required by its terms, nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to the constitutionality of his rights, and of the liabilities and duties of others under the averment given, therefore, exert no influence upon the mind of the court in the disposition of the demurrer."

In the very recent case of *Equitable Life Assurance Society v. Brown*, which will appear in 213 U. S. 25, and reported in advance sheets of U. S. Reports, No. 1, the court in the syllabus said :

"A demurrer only admits facts well pleaded in the pleading demurred to; it does not admit the pleader's conclusions of law or the *correctness of his opinions as to future results.*"

Further on in the opinion, at page 43, Mr. Justice PECKHAM, speaking for the court, said :

"As the questions in this case arise upon the defend-

ant's demurrer to the bill of the complaint, it is necessary to direct attention to the effect of a demurrer as an admission. We are not called upon to cite authorities for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill, as, for instance, in regard to the probable effect in the future of the continued control of the defendant by the interests existing therein up to 1906. Hence, any construction pleaded by complainant upon the charter of the defendant and the insurance policy issued by the defendant to the complainant is not admitted, nor is the allegation of the ownership of the surplus by the policyholders as alleged by the complainant, nor any opinion which is expressed in the bill as to the ability of the defendant to continue business, nor is any other opinion as to future happenings admitted by the demurrer."

From the above quotations it will be seen that averments construing the provisions of the chapter under consideration are not admitted by the demurrer; neither are statements in the bill which are conclusions of law; neither are averments relative to the future effect or consequences of putting the law into force. This is especially true where the averments as to future consequences are in their nature speculative.

If the act provides a specific penalty for its violation, or a failure to do a certain thing in the manner prescribed, then a statement in the bill that if the complainant should disregard the act the consequences or penalty fixed therein would be inflicted or attempt to be inflicted upon him is a proper pleading of a necessary consequence. But if the deleterious result is not directly or indirectly provided in the act, and is the expression of the opinion of the pleader, the demurrer does not admit the truth of such fact, no matter how well it may be expressed.

In the first place, the oft-repeated averment in the bill, that all of the assets of an insolvent bank, and all of the double liability of the stockholders, shall, under the law, be applied exclusively to the payment of the



claims of guaranteed depositors before any other depositor or creditor may share in any way in the assets or funds of the bank, will not be taken as a statement of fact admitted by the demurrer, because the act itself is attached to the bills and the court is more competent to construe the language of the act than counsel.

Nor will the statement in paragraph 3 of subdivision IV of the bill, to the effect that the purposes of the bank guaranty act is, by way of direct and indirect compulsion, to require all existing incorporated state banks to accept the provision of said act, be admitted. Under the rule as laid down by Mr. Justice PECKHAM, this is a pleader's conclusion. Later in the same paragraph the statement is made that a new bank may be given preferential rights "to the detriment and disadvantage of the existing banks of said city or town." None of such matters are admitted, because they are only speculative statements giving the opinion of the pleader as to what would be the result of an enactment looking at it from his own view-point.

In the above we have not attempted to select all of the averments which are not admitted under the rules laid down by the supreme court. The court will find many others which will be readily suggested in the reading of the bill. In the interest of time and space we have culled out a few of the most apparent, knowing that the court will apply the rules of pleading to any and all averments falling under the condemnation of the above rules.

### JURISDICTION.

COMPLAINANTS DO NOT SHOW AN INTEREST THE NATURE OF WHICH ENTITLES THEM TO QUESTION THE CONSTITUTIONALITY OF THE STATUTE ATTACKED BY THEM.

Complainants show that a number of banking corporations organized by virtue of the state laws do not choose to avail themselves of the provisions of the law, and a few of the banks claim that they are not ad-

missible to the benefits of the guaranty fund unless they make some change in the amount of surplus now carried by them.

No private property right is infringed by the law, unless it be that under the operation of the several classes of banks allowed by this law one class will have the advantage over the other in business. This is a matter which appeals purely to the business judgment of men. It is a question over which there is much difference of opinion, and is, therefore, one which must be determined solely by the legislature of the state. The legislature of Kansas did not go so far as to attempt a solution of the question absolutely for all men, but left it open for each bank and class of banks to decide for themselves. In other words, this is a question concerning the political policy of the state upon a matter within the police power, and it presents no injury to the private property rights of the complainants which entitles them to relief in a court of equity.

No attempt at an exhaustive discussion of this elementary principle will be made. We shall be content to call the attention of the court to pertinent quotations from well-known cases upon this proposition.

In the famous case of *Marbury v. Madison*, 1 Cranch 137, the court said:

"A legal remedy by suit in equity or by action at law is available whenever a legal right is invaded."

The question of what constitutes a legal right, so as to enable a party to complain of a statute as unconstitutional, has often been the subject of determination by the courts.

The rule as gleaned from all of these decisions is stated in *Cyclopedia of Law and Procedure*, volume 8, page 787, as follows:

"It is a firmly established principle of law that no one can be allowed to attack a statute as unconstitutional who has no interest in it, and is not affected by its provisions. This rule applies to all cases both at law

and in equity and is equally applicable in both civil and criminal proceedings. All constitutional inhibitions against the taking of private property without due process of law, and all constitutional guarantees of equal rights and privileges are for the benefit of those persons only whose rights are affected and cannot be taken advantage of by any other persons."

With respect to discriminations this work continues:

"The denial of equal rights and privileges by discriminating legislation can be pleaded only by those who can show that they belong to the class discriminated against. This has been held in numerous cases, and the rule applies to all cases affecting civil cases of every kind and to all cases in which property rights alone are affected."

In the case of *The State v. Smiley*, 65 Kan. 240, Chief Justice DOSTER used the following language:

"He [the defendant] cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism in the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of the equal protection of the law, but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded. Hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamental and decisively settled."

This case was appealed to the supreme court of the United States and there affirmed (*Smiley v. Kansas*, 196 U. S. 447), and Mr. Justice BREWER, who wrote the opinion, incorporated into it with approval the part of Justice DOSTER's opinion quoted above.

It is clear then from this case that where the legislation does not directly affect the property rights of the complainants they have no standing in court.

If a party will not be heard to complain of an unconstitutional statute because he does not bring himself within its constitutional provisions, he could not be heard to complain of a statute which upon its face

offers to leave him entirely alone and not to interfere with his business in the slightest degree. The statute in question offers to all incorporated banks the right to participate in the fund upon reasonable conditions, and to all those who do not care to comply with those conditions the law says, you may enter if you desire, but if not, you may go your way in peace.

It is answered by the complainants that the law will give to those banks which are admitted more favorable business conditions than it would leave for those who do not enter the fund and to national banks; that this will injure the business of each bank and what one bank could complain if all of the banks may complain jointly, and that what they complain of is a general injury to the business of national banks and certain state banks.

First, it may be said that no one has a right to complain because some regulation within the police power of the state may reflect injuriously upon his business. Such a contention would avoid all of the license and inspection laws and other attempted regulations of public businesses.

As to the banks bringing this suit, it may be said that the requirements for entering into the guaranty fund are not materially different from many of the requirements of the general banking law of the state, and they ought not to be heard to complain of something which they do not care to comply with.

Indeed, it has been held by this court (*Bank v. Pa.*, 167 U. S. 461) that discriminations cannot be complained of where the want of uniformity *is the result of the deliberate action of those complaining of it.*

The state of Pennsylvania, in the year 1891, passed a law by which it gave to the different banks doing business within the state the privilege of collecting from their stockholders a tax of eight mills on the dollar of the face value of the capital stock of the bank, and putting it into the state treasury, in lieu of all tax assessments, and further providing that, in case they

did not elect to collect the eight mills taxes from the stockholders, the uniform tax of four mills on the dollar should be levied upon the actual cash value of the capital stock of all banks doing business in the state.

In 1895 the validity of this law was before the supreme court of Pennsylvania, in the case of *Commonwealth v. Merchants & Manufacturers National Bank*, 168 Pa. St. 309, 31 Atl. 1065, and the law was there upheld. In the body of the opinion Mr. Justice WILLIAMS, speaking for the court, says:

"It proposes to relieve all the banks from local taxation that elect to pay a certain rate per cent upon their shares of stock directly into the state treasury. All the banks may come into this class. All that do are assessed with a uniform rate per cent, which they pay at one time and one place. Those that elect not to pay this rate are assessed at a lower and uniform rate upon the appraised value of their shares, and upon this valuation the local as well as the state taxes are assessed. We cannot say that this classification is unconstitutional, nor that the rate per cent differs so widely as to invalidate the law. The rate is uniform for each class, and the aggregate of the taxes levied per share in both classes is as nearly the same as could well be estimated in advance of the action of the local authorities, which it is impossible to forecast with accuracy. The banks are themselves responsible for the existence of the second class. They are all invited to deal directly with the state. If they do not, it is fair to assume that their action is guided by what they believe to be their own pecuniary interest. Of a want of uniformity, which is the result of their own deliberate action, they certainly ought not to complain. Of a want of equality of burden that results from circumstances affecting particular banks, and is not produced by the application of the law, they cannot complain. We think the learned judge decided this case correctly, and the judgment is now affirmed."

This case was afterward before the supreme court of the United States, by appeal, and is entitled "*Merchants & Manufacturers Bank v. Pennsylvania*, 167 U. S. 461, 18 Sup. Ct. Rep. 221," and there the constitutionality of the law under the equal protection clause

of the fourteenth amendment to the federal constitution was raised and decided. The opinion in the case was delivered by Justice BREWER. In the syllabus the court said:

"There is no lack of uniformity of taxation under that act which renders it obnoxious to that part of the fourteenth amendment to the federal constitution which forbids a state to 'deny to any person within its jurisdiction the equal protection of the laws,' as the right of election which, if not availed of by all, may produce an inequality, is offered to all.

"That act treats state banks and national banks alike; gives to each the same privileges; and there is no discrimination against national banks as such."

In the opinion the learned judge says:

"Again, it will be perceived that this inequality in the burden results from a privilege offered to all."

On principle no question of discrimination or lack of equal protection under the law can be raised where the right to take advantage of the privileges or accept the burdens imposed by the law is voluntary so that the different institutions belonging to the class may or may not, as they see fit, avail themselves of the privileges or assume the burdens granted or imposed by the law. The principle was so tersely and plainly laid down in the syllabus in the Pennsylvania case that there can be no controversy between these complainants and the state of Kansas as to the right of the state to continue the operation of the bank guaranty law.

Besides all this, the principle is universally recognized that one who is not injured as to his private interests may not bring a suit to test the constitutionality of a law for the benefit of the public generally. As bearing upon this discussion, it will be noted that in one part of their bill complainants seriously allege an injury to their business interests arising out of the more favorable terms upon which guaranteed banks will be allowed to transact business. In the latter part of their bill they allege that the law is a fraud upon the public, the security offered is insufficient, and will re-

sult in harm and disaster to the banks which undertake to comply with its provisions. Upon which of these inconsistent statements do the complainants stand? Are they seeking to enjoin the law because of some injury to their property interest, or are they seeking to enjoin it for the good of the public generally?

"Alleging inconvenience to private parties in common with the public in general occasioned by the exercise of a right conferred by law for the benefit of the public, gives them no right to damages."

*Hamilton v. Vicksburg S. P. R. Co.*, 119 U. S. 280.

On this branch of the case we call the attention of the court also to the following authorities:

*Turpin v. Lemon*, 187 U. S. 51. (Opinion, p. 60.)

"This is an effort to test the constitutionality of a law without showing the plaintiff had been injured by its application." (*Branton Co. Ct. v. W. Va.*, 208 U. S. 192.)

#### THE RIGHTS OF COMPLAINANTS AS TAXPAYERS.

It is a well-established proposition that a private citizen and taxpayer will not be permitted to enjoin the acts of a public officer, even though it be admitted that such public officer is acting under the authority of an unconstitutional law, unless it be further shown that some private property interest of the individual is injured.

"A court of chancery has no jurisdiction to interfere with the public duties of any department of government, except under special circumstances and where necessary for the protection of rights of property.

"Equity will not interfere by injunction to restrain persons from exercising the functions of public officers on the ground of the want of binding force in the law under which their appointments were made, but will leave that question to be determined at law."

*Sheridan v. Colvin*, 78 Ill. 237.

See, also, *Thompson v. Canal Fund Comm'r*, 2 Abbott's Prac. 248.

Mr. Chief Justice FULLER, in *Arkansas Building &*

Loan Asso. v. Madden, 175 U. S. 269, states the rule as follows:

"The rule is that the collection of taxes under state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it must appear that the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of equity jurisprudence."

Many cases are there cited in support of this principle.

The complainants in this case, however, claim they have a right to maintain this suit under the authority of *The City of Hutchinson v. Beckman*, 118 Fed. 399. The opinion in this case is by Judge THAYER, and covers the entire question of the right of the taxpayer to maintain a suit against a tax alleged to be unconstitutional. We claim it is clearly shown in that case that these complainants cannot maintain their bill. They do not show any injury or interest in the case or any attempted interference with their business, of any kind or character, except the bare assertion that illegal taxes will be collected and applied under this law. The fact of the interference with their business is conceded to be only such interference as occurs from increased competition with the "safety fund" state banks. This matter has been elsewhere disposed of in this discussion, and therefore leaves complainants depending solely upon the claim of an illegal tax for interest sufficient to support the bill. The bill in this case even admits that the amount of alleged illegal tax does not, and never will, exceed \$2000 as to each of the complainants. Now Judge THAYER, in the case referred to above, after stating that suits to enjoin an illegal tax will not be entertained where the amount in controversy is less than \$2000, makes the following statement:

"The present case is distinguishable from the cases relied upon by the complainants in that the tax involved is a license tax imposed by a municipality upon a busi-



ness concern, the payment of which tax may be enforced by fining and imprisoning its employees and by daily arrests that will seriously interfere with the prosecution of complainant's business and inflict a much greater direct loss than the amount of the tax. The suit at bar, in view of the allegations touching the effect upon the complainant's business, if the city is permitted to proceed with the enforcement of the ordinance in its own way, is in reality a bill to prevent the city from breaking up and destroying an established business under the guise of enforcing an illegal ordinance."

We understand, of course, that the burden is upon complainants to show by their bill conclusively that the law will result in an unconstitutional act before they have any authority whatever to raise the question in a court of equity, and then they must show, in addition to that, that the amount of illegal tax will exceed \$2000 as to each complainant and that additional reasons in equity exist authorizing a court of equity to take cognizance of the case.

"But in order to bring taxation imposed by a state or embraced within its authority within the scope of the fourteenth amendment of the national constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exercising the power to tax."

Henderson Bridge Co. v. Henderson, 173 U. S. 614-615.

#### A CONSIDERATION OF THE PROVISIONS, CLASSIFICATIONS AND ALLEGED DISCRIMINATIONS OF THE BANK GUARANTY LAW.

Complaint is made in the bill, and at previous hearings, of the classifications contained in chapter 61. All kinds of opprobrious epithets are applied in the denunciation of these classifications. But, as has been frequently said, the number and forcefulness of the adjectives used do not add to the force of averments, and we apprehend that, although the classifications in this

chapter are denounced as being unfair, unjust, perfidious, arbitrary, immoral, preferential, unscientific, unconstitutional, unbusinesslike, diabolical and nonsensical, the court will consider these classifications along legal lines for the purpose of ascertaining whether they are arbitrary to such an extent as to encroach upon the constitutional rights of the complainants here before the court.

The basis of the power of the legislature to create classes is declared in *Santa Fe v. Matthews*, 174 U. S. 106:

"The power of classification is upheld whenever said classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished."

The purposes of the guaranty law fall naturally into two divisions: First, it was sought to protect the integrity of the safety fund by excluding any unsafe banks. Second, it was necessary to fix the amount to be charged or contributed by any bank joining the fund on an equitable basis.

Before proceeding with the detailed discussion of the objections urged against these classifications, we call the attention of the court to other statements of general principles relative to the power of the legislature in creating classes.

"Whenever a law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied." (*Walston v. Nevin*, 128 U. S. 582.)

In the *Matthews* case, referred to above, it was said:

"It is the essence of classification that upon the class are cast duties and burdens different from those resting upon the general public."

Keeping in mind then the objects of the legislature in creating these classes, and these general principles, we proceed to discuss the many classifications complained of by complainants.

*First.* We have the general classification between banks themselves. The act provides that incorporated

banks may participate in the fund and, therefore, all others are excluded. Has the legislature authority to create a classification of banks based upon incorporated banks and those not incorporated? The very fact of incorporation itself creates such a class, and it has been held that the state in the exercise of its police power may even prohibit banking to any but incorporated banks.

State of North Dakota, *ex rel.*, v. Woodmanse, 11 L. R. A. 420, and the many cases and authorities there cited.

The states in the regulation of the business of banking have found it much more convenient to control the amount of surplus, reserve and capital and their relation to deposits by means of incorporated banks than by banks controlled by private parties, and for this reason alone, in determining the soundness of the bank and fixing the charge for controlling the fund, the incorporated bank was to be preferred over the private bank. Indeed, the legislature thought that there was no way of obtaining accurately and with precision the amount of risk the fund would assume by guaranteeing the deposits of a private banker, and no way of fixing equitably as to other banks what he should be charged for entering into the fund. He was not denied admission to the fund, however, because by becoming incorporated under the general banking act he could participate in the fund. There was no discrimination against him to any greater degree than the general banking law discriminated against him, and it is a matter of common history that the general banking act of 1891 practically forced the private bankers out of business in Kansas, and either by inducement or discrimination resulted in practically all of them coming under the terms of the general law. This was all the bank guaranty law asked of private bankers and offered them the benefit of the fund as a premium for becoming incorporated and complying with the other general banking laws of the state. Finally, as to private banks, there are no private banks complaining here in this suit.

*Second.* Within the general specifications of incorporated banks are other classifications. As, for instance, found in section 1, it must have a paid-up and unimpaired surplus fund equal to ten per cent of its capital. In support of this, we believe it is sufficient to say such a classification is necessary to sound banking. It has been the policy of the state to require the building up of a surplus fund by the banks operating under its law; it has also been the policy of the federal government to build up a surplus fund in the national banks. It is therefore the public policy of both state and federal governments in the interests of safe banking.

Section 32 of chapter 11a, Laws 1901 of Kansas, having been enacted in 1897, is as follows:

*"The directors or owners of any bank doing business under this act may declare dividends of so much of the net profits of their bank as they shall judge expedient; but each bank shall, before the declaration of a dividend, carry one-tenth part of its net profits since the last preceding dividend to its surplus fund, until the same shall amount to fifty per cent of its capital stock."*

The same provision was in the banking law of 1891, being section 30 of chapter 43, Laws of 1891, so the question of building up a surplus is not a new question incorporated for the first time in the law under consideration. As to the amount of surplus required, that would properly be a matter of detail within the province of the legislative body. The matter of capital and surplus and their relation to deposits is necessary to be considered in finding the amount required to be contributed by each bank.

*Third.* The next classification under section 1 of the act is, that the bank which becomes authorized to do business after the passage of the act must be continuously in the banking business for at least one year. The provision specifically says: *"Any bank which may after the passage of this act be authorized to do business in this state."*

So that under the act a bank which may have been organized thirty days before the passage of the act, if it complies with the other provisions of the act, as to surplus, etc., would be admitted. The bank which was organized after the passage of the act surely has no cause of complaint, because it took its charter knowing that it could not participate in the fund until after it had been organized and actively engaged in the banking business for one year. That provision became a part of its charter at the time it was granted.

*Fourth.* A further classification in section 1 is a provision to the effect that the one-year limit should not apply to banks organized in any city or town in which all of the banks shall have neglected or failed for a period of six months after the taking effect of the act to avail themselves of its provisions.

From the title of the act it purports to be for the security of depositors, and the whole act is built up around the proposition of securing the depositors. The legislature, in its wisdom, had the right to provide that any community tributary to a town or a city where the established banks, for a period of six months, did not see fit to avail themselves of the benefits of the act, a community made up largely of the depositing class, should not be deprived of the benefits of the security fund by reason of the fact that no bank in their community saw fit to qualify under the act; therefore the law-making power saw fit to allow newly organized banks to come under the law, thus extending the benefits of the act to the depositors in that community, the new bank being required to submit to the necessary examinations, comply with all of the other provisions, have an actually paid-up and unimpaired surplus fund of ten per cent of its capital stock, and all of the other safeguards provided in the law. It seems to us, in view of the objects and intent of the act, this is a detail and a classification which comes fairly within the power of the legislative body, and a court will not say it is unjust or arbitrary.

*Fifth.* Complaint is made also that the board of directors have no discretion in passing the resolution seeking to be admitted to the fund—that the action of the board of directors becomes compulsory and without discretion after the stockholders have instructed them to pass the necessary resolution. We are of the opinion this situation cannot embarrass the court. It is a matter of detail in the internal workings and management of the bank. The directors are but the servants of the stockholders, and under the law must be a part of the stockholders; therefore they, as stockholders, participate in the deliberations of the more democratic body, which orders or authorizes the necessary resolution.

*Sixth.* The objections which are made as to the amount of assessment required, the amount of bonds required to be deposited in the good-faith fund, are matters of detail for the law-making power, and upon which different minds may reasonably differ, but are not of such a nature as to in any wise invalidate the law as such.

In section 2 will be found the provision as to the amount of bonds to be deposited in the good-faith fund, and the amount of actual assessments. Complainants complain of the provisions of this section because no assessment shall be less than twenty dollars, and no amount of bonds deposited less than five hundred. This complaint could only be heard coming from a bank within that class which had applied for admission to the benefits of the act. At least, it is not shown in the bill that any detriment comes to any of the complainants by reason of that provision; that the provision is not arbitrary, it has been a part of the policy of all states and the national government to fix minimums and maximums in amount of payments required to be made, so long as it treats all in the class the same.

*Seventh.* In section 4 is found a classification as between depositors, that upon the insolvency of the bank the depositors, without regard to whether they are in

the class guaranteed or not, receive certificates of the amount due them bearing six per cent interest, except where a different rate of interest has been agreed upon between the bank and the depositor, that rate shall prevail in the certificate.

Under the law of banking, all deposits which are subject to check are due on demand. If a bank becomes insolvent it does not pay on demand. Therefore, the deposit is due. Under the law of Kansas all past due indebtedness bears interest at the rate of six per cent per annum, unless a different rate has been agreed upon between the parties, and then that rate prevails. This provision is but a repetition of the law of contracts, which has been the law of the state of Kansas for many years.

This section also provides that after all of the assets of the bank and the double liability of the stock has been paid to the depositors, if there is a deficiency, the bank commissioner shall give his check, countersigned by the state auditor, to those depositors holding certificates for funds which were subject to guaranty, for the balance due them in full, to be paid out of the bank guaranty fund. No discrimination is there made against the distribution of the assets as such, nor the moneys derived from the double liability of the stockholders. These are distributed as theretofore provided by law under section 461 of the General Statutes of 1901, as amended by section 7 of chapter 59 of the Laws of 1909.

The contention of counsel that the word "depositors," as used in section 4 of the guaranty act, was meant and would operate to the exclusion of other creditors, is unwarranted, either by the reading of the section or by the history of the banking laws, in view of section 7 of chapter 59. No change has been made by the bank guaranty law in the distribution of the assets of the bank, and the amount realized from the double liability of the stockholders. That remains as it was before. After that has been distributed, those depositors who

come within the guaranteed classes (and all depositors may come within those classes if they see fit) are paid the balance of their claims, if any, out of the bank guaranty fund. No right which any other creditor had is taken from him.

In the bill, in several different places, it is stated specifically that under the bank guaranty law all of the assets of the bank of every kind and character, all of the funds derived from the double liability of stockholders, and all credits and bills receivable, would, under this law, be applied, first, to the payment of the *guaranteed* deposits, to the exclusion of all other depositors or creditors.

In reply to these averments we answer, in no event can the law bear the construction claimed in the bills of complaint, such a construction being entirely foreign to the wording of the section.

In section 4 is found the provision upon which they base their claim, as follows:

"After the officer in charge of the bank shall have realized upon the assets of such bank and exhausted the double liability of its stockholders, and shall have paid all funds so collected in dividends to the depositors, he shall certify all balances due on *guaranteed deposits*, if any exist, to the bank commissioner."

It then provides that the bank commissioner shall pay this balance out of the guaranty fund. In the first instance, the court will see that the persons to whom the assets of the bank and the money derived from the double liability are to be paid are *depositors* without limitation. Further on in the quotation, where the list is provided for the bank commissioner to pay out of the guaranty fund, it uses the words "*guaranteed depositors*." It might be that the first word "*depositors*," as used in the quotation, would have better expressed the meaning of the legislature if it had been "*creditors*" instead of "*depositors*," in view of the other provisions in the banking law; however, a court, in construing such a provision, which seems to be pointing out simply



the procedure to be followed by the receiver, and which must necessarily follow any other provisions of the banking law, will construe that provision to mean either a payment of the assets and the double liability to all of the creditors of the bank, or that it meant only that proportion of the assets which should, under the general law, be applied to the depositors, not excluding other creditors, and when such *pro rata* had been applied to its full extent in the payment of such claims, then the balance due to "*guaranteed depositors*" should be certified to the bank commissioner.

In section 461 of the General Statutes of 1901 it was provided that all sums collected from the double liability of the stockholders should be distributed *pro rata* to the creditors in the same manner as other funds. By section 7 of chapter 59 of the Laws of 1909 section 461 was amended, but no change was made affecting the manner of distributing the assets of an insolvent bank. That provision remained unchanged, and is retained in the new section in these words: "All sums so collected to become a part of the assets of such bank, and to be distributed *pro rata* to the creditors thereof in the same manner as other funds."

This provision is exactly the same contained in section 461 of the Laws of 1901.

Chapter 59 of the Laws of 1909 was approved March 5, 1909, and published March 8. The bank guaranty law was approved March 6, 1909, and published March 10, but both laws were passed at the same session of the legislature, as a part of the bank regulation and control by the state; both chapters forming a part of the one general plan of bank control. It cannot be said that through the use of the word "depositors" in section 4 of the bank guaranty act it was intended to thereby take away from any creditor his *pro rata* share of the assets of the bank, including the double liability of the stockholders. Courts give such construction to statutes, and especially those passed at the same session

of the legislature and as a part of the same general plan, as will harmonize them.

Again, while in the bill they say in general terms that they are creditors of banks which are now in the bank guaranty fund, and of banks which are out of the guaranty fund, and of banks which will in the future come under the provisions of the guaranty fund, and that they will in the conduct of their business become such creditors in the future, they do not state definitely in what way they are such creditors. The only way pointed out by which they become creditors is by the making of deposits in these different banks; therefore, we take it that they have not placed themselves in a position to claim any rights under that provision, even though the court should hold it to the narrow construction claimed for it by complainants. That question could only arise upon the insolvency of a bank, when a creditor came into court demanding his right of a *pro rata* distribution of the assets of the bank, showing that such distribution had been refused.

The word "depositor" as used in section 4 of the bank guaranty act, in connection with the other statutory provisions relating to banks, is broad enough, and the court will construe it to mean any creditor of the bank.

"A statute must be construed with reference to the whole system of which it forms a part."

The bank guaranty law upon its enactment became part of the general banking system and policy of this state. The legislative object in that particular chapter was not the distribution of the general assets of the bank, but the formation of a bank guaranty fund to be applied in payment of balances due depositors after the application of the general assets of the bank.

Section 7, chapter 59, passed at the same session, treated particularly of the distribution of the assets, and in no wise providing for a guaranty fund. That section was a part of the banking plan and provided for the distribution of the assets *pro rata* among the credi-

tors in the same manner as had been provided continuously since 1897. That being a direct statement of the legislative intent, it will stand as against an indirect statement as contained in section 4 of the guaranty act upon that particular subject.

*Eighth.* We next come to the character of the deposits which may be guaranteed under the law. This classification is found in section 6. The first is: Deposits which do not bear interest. This classification takes the great bulk of the deposits in banks of money which is intended to be used from day to day in the transaction of the commercial business of the world. It is the blood running through the arteries of commerce, which, if it is in any way obstructed, not only obstructs the banking business, but every other class of business in a community, or in the state at large, or the government, depending only upon the extent to which it is obstructed. These deposits are the merchant's account in the bank, upon which he checks from day to day to pay his bills as they come due, to keep his business in operation. These deposits are those which the lawyer, the mechanic, the farmer, the doctor, the preacher, the laboring man, and every class of citizens, keep in the bank for the purpose of paying the bills contracted by them in favor of the merchant, the butcher, the laborer, the mechanic and every other class with whom he has business connections.

On the other hand, the daily deposits which bear interest are, as a rule, those which are not used in the daily transaction of the commercial business of the state or of the nation. They are funds which are expected to remain for some indefinite time in the bank. The clogging of this artery, while it would inconvenience the particular persons, would not stop or retard the business of the community. These seem to our mind to be sufficient reasons for placing deposits which do not bear interest, the very life of the trade of the nation, in a preferred class, so that in case of insolvency the merchant receives immediately his certificate,

bearing six per cent interest. He knows this certificate will be paid in full. He may, if he sees fit, use it as a cash item. Any other bank would be glad to receive the certificate and give him credit therefor, and his checking deposit, which was yesterday in A. Bank, is to-morrow in B. Bank. His ability to pay his commercial bills as they fall due is not interrupted.

On the other hand, if deposits upon which interest on the daily balance is paid are placed in the guaranty fund, it would encourage banks to offer as high a rate of interest as possible upon daily balances for the reserve of other banks, which is acknowledged by all banks to be dangerous banking.

The next classification is: "Time certificates not payable in less than six months from date, and not extending more than one year, bearing interest at not to exceed three per cent per annum, and on which interest shall cease at maturity."

In this class of deposits is included, to a large extent, especially in those cities where there are no savings-banks, the smaller deposits of the laborers, the widows, the depositor of small means, and as a rule include the entire earnings of the class to which they belong.

The next class, as shown by section 6, is: "Savings accounts not exceeding in amount one hundred dollars to any one person, and not subject to check, upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal, and bearing interest at not to exceed three per cent per annum." This class takes in the purely savings deposits. The history of the savings-banks is, that they represent the daily or weekly savings of the laboring or industrial classes, outside of the merchants, or those who use their money daily in the conduct of their business—the clerk, the serving-woman, the day laborer, the mechanic, and all classes whose savings are small, but who desire to build up for some unfortunate day as much of a bank account as possible. This class and the class next preceding should in all reason have the especial protection

of the law. The legislature, in its wisdom, has the power to make such a classification so long as this right applies to every one in the class, and so long as any other citizen may enter this class if he desires.

We also find in section 6 those deposits which are not within the benefits of the bank guaranty act, and first, those which are primarily rediscounts. If A. goes to B. Bank, desiring to borrow one thousand dollars, the bank takes from him such security as it sees fit, and loans him the money, and takes his note therefor; A. then owes B. Bank one thousand dollars. If, afterwards, B. Bank desires to realize upon this note before its maturity, it takes the note to C. Bank, together with such security as A. gave, and sells the same to C. Bank and indorses it. This is a rediscount. C. Bank takes the note upon the faith of A. and the security which he has offered to B. Bank, looking, however, to the indorsement of B. Bank, and even though the two banks treat it as a deposit by C. Bank in B. Bank, C. Bank has, in addition to what any other depositor would have, the note and security of A. for the repayment of its money or deposit. There is no reason why such a deposit should be guaranteed, because the transaction is simply a business transaction, the same as if one broker would sell a note to another. If the note of A. and the security offered by him is not sufficient, then B. Bank would refuse to loan him the money in the first instance, and C. Bank would not take the note from B. Bank.

Next, we have "money borrowed by the bank." Under the authorities, all deposits are a loaning of money to the bank, but the ordinary deposit has been by banking law and banking usage classified, and is not looked upon as a general borrowing of money, because the amount of the deposit is subject to check, while in the ordinary borrowing of money there is time limit when the return may be demanded, and that is the kind of borrowed money referred to in section 6. If B. Bank desires to borrow money from C. Bank, or from any

other institution or person, they treat with each other the same as any individuals who desire to borrow money. None of these classes of deposits could equitably be guaranteed on the same terms as ordinary deposits.

Under section 446, chapter 11*a*, Laws of 1901, a bank is permitted to borrow money for temporary purposes, not to exceed fifty per cent of its paid-up capital, and may pledge assets of the bank not exceeding twenty per cent in excess of the amount borrowed as collateral security therefor; therefore, if B. Bank desires to borrow money of C. Bank, the latter has the right to demand security for the loan, and if it is safely secured—and whether it is or not is a matter of business discretion between the banks—it would not seem that it was necessary to further secure it by placing it in the guaranty fund, because in case of insolvency the loaning bank has its collateral which it may exhaust to the exclusion of all other creditors.

The next class of deposits which are not guaranteed is "all deposits otherwise secured." This takes largely state funds, county funds, city funds, school district and other municipal funds. The law allows these municipalities, upon depositing their money in banks, to take security therefor. For all of these deposits, except state deposits, the security must be outside of the assets of the bank. For the state deposits the security is municipal bonds, which are a part of the assets of the bank. In case of insolvency, these municipalities may resort to their specific security and obtain their money. The state resorts to the bonds deposited with it as security, and obtains its money. Therefore, if these municipalities and the state use due care, there is no possibility of loss on their part in case of insolvency of the bank. Why, then, should they be given a further preference by being placed in the guaranty fund.

The next class is, the obligations of a bank as indorser upon bills rediscounted and bills payable. It takes but a statement of the proposition to show this to be a

reasonable classification, for the very sufficient reason that neither of these in any way relate to the question of deposits. The law was framed for the protection of depositors. The bank's liability as an indorser upon a rediscounted note, or an obligation for which it had given its note, is in no sense a deposit, and would be foreign to the purposes of the act.

The last classification is, "money borrowed temporarily from its correspondents or otherwise." For the reasons heretofore given, the person or corporation loaning this money has the right to exact security from the assets of the bank, and should not be accorded the right of further security.

*Ninth.* In section 7 of the act it is provided:

"No bank which pays interest at a rate greater than three per cent per annum upon any form of deposit . . . shall be permitted to participate in the benefits of the act."

Here again the classification was in the interest of safety to the fund and sound banking, and the limitation of interest was an attempt to solve a difficulty, which went to the very heart of the whole plan. It was argued against the law that dishonest persons would engage in banking, and having secured the public confidence by joining the "safety fund," would seek to attract large deposits by paying unfair rates of interest. The result would be the destruction of the prestige of the honest and conservative banker while such methods were employed, and finally the failure of the banker who has been guilty of such unbusinesslike methods. The fund would thus be weakened, the banks of the whole community injured, and the whole purpose of the law defeated. It was also manifest, for the same reasons mentioned above, that bankers who paid the higher rates of interest for deposits were poorer risks than those who paid less rates of interest, and that the rates for admission to the fund should not be the same to both classes of bankers. The solution, therefore, was

to offer bankers the choice between paying only fair rates of interest or staying out of the fund.

For the same reasons it is also provided in section 7 that no bank which pays any interest on savings deposits withdrawn before July or January first next following the date of the deposit shall be permitted to participate in the benefits of the act.

The dates January and July first are in themselves arbitrarily selected. March and September, June and December, or any other six-months period would have answered as well.

It has always been the custom of banks carrying savings accounts to fix semiannual periods for carrying forward the interest accumulations on the savings deposits. This was done as a matter of economy, as the accounts are small and numerous. By having the interest period the same in all accounts the work may be done with less clerical force than if a few hundred accounts came due each day. The fixing on these dates is enacting into law a custom universally used by savings departments of banks. Prohibiting interest payments at other periods carries out the original plan of not admitting deposits upon which interest is paid on daily balances, because if interest is paid on withdrawals made before the semiannual interest-paying periods, it amounts to payment of interest on daily balances.

It is also provided in section 7 that no bank which pays interest upon a time certificate cashed before its maturity shall be permitted to participate. The payment of such interest is the same as paying interest on daily balances.

While on the subject of interest-bearing deposits, around which are built most of the certifications of deposits, it seems to be the policy of the state to reduce this class of deposits to the minimum. The reasons are twofold, as shown by banking experience. The desire of the officers of the bank to increase its earnings, in the interest of the stockholders, either induce them to charge a higher rate of interest to offset the interest



paid the depositors, or they encroach on the reserve fund in making loans and reduce that fund below a safe point; in the first case, increasing the rate of interest to the borrower, and in the second endangering the solvency of the bank, both being the result of payment of interest to depositors. The higher the interest paid to depositors the higher the rate to the borrower, or the greater the encroachment on the reserve. The state in its wisdom saw fit to make a uniform rate of interest not exceeding three per cent and exclude deposits on which interest is paid on daily balances. The state is the judge of the wisdom of this regulation.

*Tenth.* Trust companies are also excluded from the benefit of this act. While trust companies are permitted under the laws of Kansas to receive deposits, they are not properly banks. They have privileges and rights which are not in line with the banking business. A reference to chapter 425, Laws of 1907, will disclose the many functions of trust companies entirely foreign to banking. We note a few: They may receive on deposit for safe-keeping personal property of every description; they may accept and execute all trusts committed to them; they may act as assignees, transfer agents, receivers, trustees, executors, administrators and guardians; they may act as attorneys; they may act for any person or corporation; they may become surety on official or other bonds; they may insure and guarantee titles to real estate; and may do many other acts, which need only to be mentioned, to show that they are in no way in common with a banking business, and should not be classified as such, and could not therefore be guaranteed on like terms with common banks, which take the usual commercial deposits and nothing else, and are therefore subject to no other liabilities.

*Eleventh.* By way of a few general observations in relation to all of these classifications, we desire to say it will be assumed by this court that all persons who

have the right of voluntary action conduct their business in a manner which seems best to them and to their best interests. The person who desires to deposit his money, or a portion thereof, in a bank which will pay him four per cent interest has an undoubted right to do so; the person who desires to deposit his money in a bank which will pay him some rate of interest upon daily deposits has the undoubted right to do so; the person who desires to carry a savings account of more than one hundred dollars upon which the bank has not reserved in writing the right to require sixty days' notice of withdrawal has the undoubted right to do so, and has the undoubted right to make such contract with the bank as it will make, and he sees fit, as to the rate of interest. If a number of persons desire to continue in the private banking business, they have the undoubted right to do so; if a number of persons desire to incorporate a trust company and do the business which such a company may transact, they have the undoubted right to do so; but each and all of them, in exercising their own judgment for their own best interests, place themselves voluntarily in these different classes. They cannot complain of the state if in the exercise of its control over its banks it recognizes the classes in which they have voluntarily placed themselves. The state has the same right to classify that the citizen has, so long as it treats all in the same class in the same way.

The court will also remember that the banking business is a moving business; that so long as the obligation into which a person has entered is carried out to the letter he is not in a position to complain. The private banker of to-day may be the incorporated banker of to-morrow; the savings depositor of to-day may be the general depositor of to-morrow; the person with a certificate bearing four per cent interest to-day may have his money in a general fund, or in a three-per-cent certificate to-morrow; changes are being made from day to day. It takes time for a new law to be gotten

into operation in all its features, and until a new law is operating in all its features, no persons or courts can say what are going to be the beneficial or deleterious results of that law. It seems to us that very largely the complaints set forth in the bills, and as presented to the court in the oral argument, are speculative and based upon fears as to what may occur in the future, and not based upon the actual fact as it now exists.

*Twelfth.* We do not presume it would be claimed upon the part of those officers representing the state of Kansas here, or their counsel, that this law of the state of Kansas is the very best law that might have been passed upon that subject. It is to some extent a new venture. There may be matters of procedure and detail pointed out by able counsel for the complainants which, if brought to the attention of the law-making body, would have induced them to change some of the provisions of the law. This does not, however, argue against the validity of the law.

### BANKS IN KANSAS.

#### THE POWER TO REGULATE THE BANKING BUSINESS AS IT HAS BEEN EXERCISED IN KANSAS.

The right to regulate banking as a public business, and as one to which the police power of the state extends, has always been recognized in this state. Article 13 of the constitution covers the topic "Banks and Currency." This was in line with the definition once given by Mr. Webster and recognized that no institution was a bank which did not have the power to issue promissory notes with a view to their circulation as money.

Afterward, and in *Pape v. Capitol Bank*, 20 Kan. 440, it was held that this article of the constitution applied only to banks of issue, and in this state we recognized an institution which performed the functions of a bank, other than that of issuing notes, as being a bank.

Again, in 1891, provision was made for the organiza-

tion of banking corporations, and the power to regulate them was assumed by the state. These rights to regulate and control were upon the following subjects:

FIRST.—*The Shareholders' Liability.* And the shareholder in every bank organized under the act was made additionally liable for a sum equal to the par value of the stock owned, and no more.

SECOND.—*The Investment of Funds.* It was provided that no bank should employ its money directly or indirectly in trade or commerce, buying or selling goods, in the stock of any other bank or corporation, nor loan on its own capital stock, nor purchase or hold any of its own shares, in this way regulating and controlling and directing the business of banking.

THIRD.—*As to Reserve Funds on Hand.* The law required banks located in cities or towns of less than 5000 to have on hand at all times in available notes an amount equal to twenty per cent of their entire deposits; for banks located in cities of more than 5000, twenty-five per cent of their entire deposits, one-half of which might consist of balances due them from good solvent banks located in commercial centers and one-half consist of actual cash; provided, that any bank which is made a depository for another bank shall have on hand at all times twenty-five per cent of its entire deposits. It further provided that when all the available funds in a bank should fall below the required amount, said bank should not increase its investments by making any new loans or discounts, nor make any dividends of its profits, until the required proportion of its lawful money reserve should be restored.

FOURTH.—*Bank Commissioner.* It created the office of bank commissioner and gave him the power and made it his duty to notify any bank whose lawful money reserve should be below the amount required to make good the reserve, and failing to do so for thirty days after notice made it his duty to take possession of the bank and proceed as if the bank were

insolvent. It gave the commissioner power to refuse to consider as a part of its reserve balances due to any bank or from another bank or association which should neglect to furnish him with such information as he should require from time to time relating to its business. It required every bank to make a report at least four times each year to said commissioner, and oftener if called upon by him for one. It required each such report to exhibit in detail all of the business of the bank, its reserves and liabilities, and required a public statement to be made of the business of the bank.

FIFTH.—*Loans Limited.* It provided that the total liability of any bank or of any one person, company, corporation or firm for money borrowed should not exceed at any time fifteen per cent of the capital stock and surplus of such bank actually paid in; and gave the bank commissioner authority to order any excess loan reduced to the lawful limit within sixty days from the date of his notice.

SIXTH. It made the officers of insolvent banks receiving deposits with knowledge guilty of a felony.

These and many other regulations were imposed by the legislature of our state upon the banking business, and yet there are those arguing in this case who affirm that the banking business is as free from control of the police power of the state as the grocery business or the blacksmithing trade.

In the case of *Blaker v. Hood*, 53 Kan. 499, the Kansas banking act was attacked as unconstitutional. It was argued in that case that the right to run a bank was not a franchise, nor does it fall within the police power of the state. The same authorities were cited as appear in the briefs for complainant in this case. The points raised were that the constitution of the state of Kansas gives no power to the legislature to control banks; that the right to carry on banking business at common law belonged to the individual and was beyond legislative control. A special attack was made upon the

act to create the office of bank commissioner and the giving of him power to require reports, make investigation and prescribe business methods intended to protect the depositors and patrons of the bank; also, the power given to appoint a receiver to wind up the affairs of a bank. The supreme court held, on page 508:

"The question with us is whether the banking business is of such a character as to warrant the legislature, in the exercise of the state's police power, to impose reasonable regulations upon the means and methods by which it is conducted. There are many occupations and lines of private business which the legislature, in the exercise of the internal police power, may rightfully regulate."

And quotes from Tiedeman on Limitations of Police Power, page 194. The court then concludes that all of the provisions of the law are within a proper exercise of this power and that the law was a proper exercise of the legislative power.

A bank is a public or *quasi*-public corporation, in the nature of the business transacted by it. By the act of incorporation, the state allows it to invite the confidence of the public and invite the public generally to bring their money to it for safe-keeping. Under the laws as they now exist, the banks of states become the depositories of public funds belonging to the states, counties, cities, townships and school districts, and it would seem to be competent for the state to make any reasonable regulation and requirement which will tend to increase the confidence of the public in its banks and will tend to the safe-keeping of its funds, both public and private, committed to the bank; and the fact that the state has adopted other regulations for the safety of the public funds in no wise argues against the right to provide regulations for the safety of private funds.

The state grants to banks organized under its laws the right to loan a certain per cent of the deposits, or use them in other lines of business, not inconsistent with a banking business. It is not contemplated that

all of the money of all of the depositors shall be in the vaults of the bank at all times. Such a regulation would entirely destroy the object of the private individual entering into the banking business; but it is contemplated that the money so deposited shall be kept safe and shall be all returned to all of the depositors at such times and in such amounts as they shall demand.

The history of banking and the usages of business have reduced almost to an exact science the proportion of the daily deposits which will be drawn out and put into the channels of business, and as the banks of the state are given the privilege to use these funds, both public and private, it would seem no departure from the original banking business, or the idea incorporated therein, that they should be required by proper regulation to secure the payment of such money and to secure the safety of the funds, so that the business of the state may be upbuilt by reason of the confidence of the public in these institutions.

The right of the state to make regulations for the security of the banking business must be assigned to the police power of the state. It has always been recognized that states have the right to control the banking business as a public business under this power. Whatever may be said about the right to conduct the banking business, it has always been recognized that the sovereign power of the state has the right to regulate it. The states and the national government have always exercised this power.

"While the right to do a banking business is not a franchise and belongs to all citizens generally, yet the power to carry on such business through a corporation is a franchise dependent upon powers granted from the state."

Bank of California v. City and Co. of San Francisco.  
142 Cal. 246.

64 L. R. A. 918.

100 Am. St. Rep. 100.

75 Pac. 832.

Such rights may be taken from the citizen by the state and given to corporations in the nature of franchises. The right to issue circulating notes by banks was at one time the right of any citizen engaged in the banking business.

In 1839, Mr. Webster, in the course of his argument in *Bank of Augusta v. Earl*, 13 Peters, 519, said (564) :

"What is that, then, without which any institution is not a bank, and with which it is a bank? It is the power to issue promissory notes with a view to their circulation as money."

This franchise of state banks has been taxed out of existence by the national government and the private or state banker effectually deprived of it.

THE FUND DOES NOT BELONG TO THE STATE, AND THEREFORE THE STATE DOES NOT IN ANY WAY ENGAGE IN INSURANCE.

The bill charges that this law is about to plunge the state of Kansas into an insurance business, that such business is private in its nature, and therefore the law would be invalid for that reason. We deny that the insurance business is a private business under the decisions.

In the case of *Equitable Life Assurance Society v. Brown*, supra, at page 41, in speaking of the insurance society, Mr. Justice PECKHAM said:

"The corporation is one of the largest in the world, with its more than half million policyholders, its outstanding risks of an amount almost impossible to appreciate, and with assets and liabilities and surplus reaching into hundreds of millions of dollars in amount. The defendant is in its nature a public institution, and the interests of its policyholders are directly involved in any proceeding looking toward its winding up, and indirectly the interests of many hundreds of thousands of individuals connected with the policyholders as objects of their bounty."

This quotation suffices to indicate the view that is being taken by the courts of the insurance business and the great financial business institutions of the country.



The same words used by Mr. Justice PECKHAM as to the insurance society might well be used as to a particular bank or the banking business. However, there is nothing said in the law under consideration that would embark the state in the insurance business. The act in question allows the defendant banks coming within its provisions to contribute to a fund. It places that fund in the custody of the state treasurer simply as a matter of convenience. The custody of that fund might as well have been placed in any other officer. In section 3 of the act under consideration is the following:

"The treasurer of the state of Kansas shall hold this fund in the state depository banks, as provided by law governing other state funds, subject to the order of the bank commissioner, to be countersigned by the auditor of state, *for the payment of depositors of failed guaranteed banks as hereafter provided.*"

It will thus be seen that the only manner in which the state treasurer handles this fund the same as other funds belonging to the state is in the depositing of the same in the depository banks for the purpose of accumulating interest thereon, but the fund itself is special, kept in the custody of the state treasurer for the sole purpose of paying the depositors of failed guaranteed banks as provided in the act. It can be used for no other purpose. It does not belong to the state of Kansas. The state of Kansas has no power, by legislative enactment, to divert this fund to any other use.

In 1831 the state of Vermont passed a law very similar in its operation to the act under consideration. That law was before the supreme court of Vermont in the case of *Receiver of Danby Bank v. State Treasurer*, 39 Vt. 93, and while its constitutionality and its many distinctions and classifications were not before the court, it being taken for granted, so far as any litigation over the laws was concerned, that the enactment was constitutional and was a proper regulation and control of the banking business, the question was raised

as to the ownership of the money paid into the guaranty fund. In the syllabus the court said:

"The treasurer holds the money constituting the bank fund as a specific fund in which the state has no property, and he is charged with special duties in respect thereto."

And at page 100 in the opinion Mr. Justice BARRETT said:

"But it is claimed, under the law, it shall be held that the whole amount of that fund is in the hands of the treasurer, undiminished by the payments that have been made to the banks named of the proportions they had respectively contributed to said fund. The soundness of this claim depends on the real character in which the treasurer receives and holds the money which goes to constitute the 'bank fund.' If it be a receiving and holding of the money as the property of the state, the same as he receives and holds the money that is paid into the treasury by the collectors of taxes, that is to say, if it be money of the state, subject, indiscriminately with the money derived from taxation, to a special charge by a permanent general law, and an appropriation by virtue of such charge to the satisfaction thereof, then it would follow that the treasurer should pay over to the receiver, of the money in the treasury, indiscriminately to the full extent of money in his hands as treasurer, not exceeding the extent of such charge. But, in the opinion of the court, this is not the correct view to be taken of the subject. We think the treasurer holds the money as a specific fund in which the state has no property. He is charged with special duties in respect to that fund, and becomes officially responsible for the proper discharge of those duties.

"For present purposes it need only be added, that all the provisions of the statute upon the subject preclude the idea of that fund being absorbed by the state as a part of its general assets, with only the duty on the part of the state to permit an equal amount to be taken from the treasury to answer the purposes of the statute as to that fund. The statute provides for an entire separation of the fund; for its investment by the treasurer; for its recall by him or its replacement by the sale of securities which he has received by way of investment."

## THE POLICE POWER AND THE NECESSITY FOR ITS EXERCISE.

It is argued by appellants that there must be absolute necessity for legislation before in the exercise of the police power legislation may be had. We submit that this is not correct, that the word "necessity" in this connection does not mean a compelling necessity.

That the police power or the power to make a law must be exercised only when necessary means, when reasonably necessary to accomplish a public need as distinct from the demand of a class. *Lawton v. Steele*, 152 U. S. 133. It must be necessary for the interests of the public generally. 142 Fed. 552. The necessity is that it is necessary for the public or general welfare. See *State v. Redmon*, 134 Wis. 89; 126 A. Sr. 1012. The court, in speaking of the necessity for the law, says:

"Not that a police regulation, in form or pretense, to be one in fact must apply some absolute essential to the public welfare, but that the exigency to be met must so concern such welfare, be sufficiently vital thereto, as to suggest some reasonable necessity for a remedy affordable only by a legislative enactment, as to efficiently invite public attention thereto, it being regarded as a legislative function to primarily pass upon the matter."

The reasonable necessity for this law was to be determined, in the first instance, by the legislature. It could make provision that banks desiring to provide security for their depositors could do so by complying with the provisions of the act. The test of the necessity for it was that it promoted the general welfare of the public, that is, the people who make deposits in banks. This is the broad and general purpose of this law, and if it inspires the confidence of the public in such guaranteed banks as the complainants in their bill admit and allege that it does, then this confidence of the public is for the benefit of all, including the bankers as well as their creditors, the depositors.

## POLICE POWER AND LIMITATIONS.

The regulation of the banking business is within the power of the state to regulate and control for the protection of the interests of the public, and the stockholder in any corporation cannot complain of any such proper regulation made by the state in the exercise of this sovereign power.

"The police power of a state embraces regulations designed to promote the public convenience or general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

*C. B. & Q. v. People (Ill.), ex rel. Drainage Commission*, 200 U. S. 561.

The police power of the state is the power of sovereignty. Thus it was said by Chief Justice TANEY in the License Cases, 5 How. 583:

"It has been said, indeed, that quarantine and health laws are passed by the states, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power, that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States. And when the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the

citizens of the state from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

"The right of banking, in all its departments, at common law belonged to the individual citizen, to be exercised at pleasure. It is conceded by counsel, and it is unquestionably settled, that the sovereign authority of the state may regulate and restrain the exercise of such right. *Bank of Augusta v. Earle*, 13 Pet. 519, 596, 10 L. Ed. 274, 311; *Blaker v. Hood*, 53 Kan. 499, 24 L. R. A. 854, 36 Pac. 1115; *State, ex rel. Goodsell, v. Woodmansee*, 1 N. D. 246, 11 L. R. A. 420, 46 N. W. 970; *Curtis v. Leavitt*, 15 N. Y. 9, 52; *Atty. Genl. v. Utica Ins. Co.*, 2 Johns, ch. 371; *People, ex rel. Atty. Genl., v. Utica Ins. Co.*, 15 Johns, 358, 8 Am. Dec. 243; *People v. Bartow*, 6 Cow. 290; *Nance v. Hemphill*, 1 Ala. 551; *State v. Williams*, 8 Tex. 255; *State v. Stebbins*, 1 Stew. (Ala.) 299; 1 *Morse, Banks & Banking*, 4th ed., § 13; *Zane, Banks & Banking*, §§ 9, 10."

*State v. Richcreek*, 5 L. R. A., n. s., 878, (Ind.) 77 N. E. 1085.

It is not our purpose to go into an analysis of the banking business, but we call attention to some authorities which give reasons for regulation under this power of the state.

Freund on Police Power says (sec. 400) :

"When we examine the nature of the restrictions on the business of banking and insurance, we find that they nearly all aim at the losses resulting from insolvency of the bank or insurance company. This loss is to be averted by insisting upon some guaranty of financial stability. Provisions of this character are not absolutely confined to banking and insurance; in some states railroads or other public service corporations may not issue securities without complying with prescribed conditions, or without the consent of designated authorities; and the power of corporations to borrow may be generally limited. But in the case of banking and insurance they are not necessarily confined to corporations, and by far exceed the financial regulations imposed upon any other kind of business. While all the provisions furnish protection against fraud, they do not pretend to be limited to guarding against that danger, but plainly seek to prevent mere improvidence or inadequacy of resources."

The peculiar nature of the banking business is next considered by this author:

"The justification for this must be found in the peculiar nature of the business regulated; both banks and insurance companies deal in their own credit, while they receive cash; and, in addition, banks and life insurance companies are the depositories of a large proportion of the savings of the people, so that the management of each institution affects a considerable part of the public. These conditions create a special public danger, requiring a more incisive exercise of the police power than is called for in an ordinary business."

#### A PUBLIC INTEREST.

Section 401: "Banking and insurance, being peculiarly affected with a public interest, it follows that the right to carry on either business may be made to depend upon the compliance with certain conditions; and a license may be required as evidence of compliance. In New York, in the case of savings bank and trust companies, the authorization is only given upon ascertaining that the general fitness of the organizers for the discharge of the duties appertaining to the trust is such as to command the confidence of the community, and that the public convenience and advantage will be promoted by such establishment."

In section 40 the same author says:

"Somewhat related to the requirement of a license is that of a bond or deposit to secure the faithful compliance with police regulations, and the satisfaction of liabilities that may arise from their violation, or to serve as an indemnity fund for persons who have suffered by the fraudulent conduct of business. As a subsidiary measure of police control it appears to be permissible wherever a license may be required, but it is resorted to less frequently. A bond is required not uncommonly of the liquor sellers and of auctioneers; deposits are sometimes required of peddlers, itinerant merchants, of persons advertising bankrupt sales—above all, of persons or corporations engaged in the *quasi*-public business of banking, insurance, or warehousing."

Upon the public nature of the banking business, and the reason for state control, we quote:

"The *quasi*-public nature of the banking business,

and the intimate relation which it bears to the fiscal affairs of the people and the revenues of the state, clearly bring it within the domain of the internal police power, and make it a proper subject for legislative control. Bankers invite general deposits primarily for their own profit, and generally obtain a measure of public patronage, and the expediency of guarding the people against imposition, extortion and fraud, of affording efficient means of detecting irregular practices, and of learning the true financial condition of the bank, and the necessity of preserving the confidence of patrons in its solvency, and of protecting their interest in cases of insolvency, justify inspection and control by the state. When the sovereign people of a state, acting through the legislature, find such police regulation necessary to protect public health, safety, or morals, to prevent fraud or oppression, or to promote the general welfare, the power to act is supreme, subject only to such limitations as are imposed by the fundamental law. The question as to what regulations are proper and needful is primarily for legislative decision; yet, when the police power is used to regulate a business or occupation which in itself is lawful and useful to the community, the courts, if called upon, must determine finally whether such regulations as may have been prescribed are so far just and reasonable as to be in harmony with constitutional guaranties. *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 385, 62 L. R. A. 136, 66 N. E. 1005."

*State v. Richcreek*, 5 L. R. A., n. s., 878.

We do not desire to overburden the court with quotations from the reports, but knowing as we do the desire of the court to have all the information possible, it is the duty of counsel, as far as possible, to assist the court in arriving at a correct solution of the questions before it. We venture to call the court's attention to a number of miscellaneous cases bearing upon the questions which have been specifically referred to in the previous pages.

In *Platte Canal Co. v. Dowell*, 17 Colo. 376, the report says:

"Private corporations occupy in respect to the police power precisely the same attitude as private individuals engaged in similar branches of business. The fact

that by their articles of incorporation or charters they obtain certain rights and privileges and are empowered to transact certain kinds of business in certain specified places does not exempt them from police regulations in the interest of society; and this is true even where such regulations operate to injure the business authorized and to diminish the value of the property employed therein."

In the case of *State v. Noyes*, 47 Me. 189, the court said:

"Private corporations, without any express reservation of the powers over them in the act of incorporation, by the legislature, are subject like individuals to be restrained, limited, and controlled in the exercise of powers granted, by such laws as the legislature may pass, based upon the principle of safety to the public."

In speaking on the same subject in *Atty.-gen. v. Fitchburg R. Co.*, 142 Mass. 40, it was said:

"Even if new and more onerous duties are imposed on contracting parties, laws for the government of the citizens of the state and for their welfare and safety are not necessarily unconstitutional."

In the case of *Boston R. Co. v. York Co.*, 79 Me. 386, the court said:

"The power of the legislature to impose uncompensated duties, and even burdens, upon individuals and corporations for the general safety is fundamental. It is the "police power." Its proper exercise is the highest duty of government. The state may in some cases forego the right of taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty, and consequent power, override all statute or contract exemptions. The state cannot free any person or corporation from subjection to this power. All personal as well as property rights must be held subject to the police power of the state."

In *Com. v. Farmers' Bank*, 21 Pick. (Mass.) 542, the court said:

"*Regulation of banks.*—Where a statute provided that bank commissioners shall be appointed by the governor, that they shall visit the banks and shall have free access to their vaults, books and papers, and shall



make all such inquiries as may be necessary to ascertain the condition of the banks and their ability to fulfill their engagements, and whether they have complied with the provisions of law, and may summon and examine, under oath, the officers and agents of the banks, in relation to the transactions and condition of the banks, and that an officer or agent who shall refuse, "without justifiable cause," to appear and testify when thereto required, shall be subject to fine or imprisonment; and if upon examination of any bank the commissioners shall be of opinion that it is insolvent, or that its condition is such as to render its further progress hazardous to the public, and that it has exceeded its powers or has failed to comply with all the rules, restrictions and conditions provided by law, they may apply to a justice of the supreme judicial court to issue an injunction to restrain such corporation, in whole or in part, from further proceeding with its business until a hearing of the corporation can be had; and the justice will forthwith issue such process, and, after a full hearing of the corporation upon the matters aforesaid, may dissolve or modify the injunction or make it perpetual, and, at his discretion, appoint a receiver, it was held that the statute was not unconstitutional on the ground that a suspension of the proceedings of a bank by the injunction diminishes the period for which the bank is by its charter empowered to act as a corporation."

In *Newton v. Mahoning County*, 100 U. S. 557, the court said:

"A state statute which is a public law relating to a public subject within the domain of the legislative power of the state, and involving the public rights and public welfare of the entire community affected by it, can confer no contract right within the protection of this constitutional provision. Every succeeding legislature possessed the same jurisdiction and power with respect to such matters as its predecessors."

THE POWER IS NOT THE TAKING OF PRIVATE PROPERTY FOR A PRIVATE USE, BUT IS THE POWER TO PERMIT OR REQUIRE COÖPERATION.

As examples of authority under the police power for a state to compel coöperation in joint improvements, see *Freund on Police Power*, secs. 440, 441; the drainage and irrigation laws of the several states; the formation

of drainage or irrigation districts under such laws, which may include the lands of non-consenting owners.

Therein, in section 444, compulsory coöperation for the building of division fences or the prorating of expenses to adjoining owners has been firmly established in legislation and the validity of it so often assumed as to be beyond question. Hence, the compulsory coöperation in regard to party walls is well recognized. A compulsory coöperation in draining and irrigation is sustained by the decisions of the courts of the states and of this country. That author states (sec. 436) that compulsory insurance in connection with registration of titles, adopted by several of the states, which includes in it general compulsory mutual insurance, is not out of harmony with the American constitution, and that such legislation is getting more general in the United States, and has been general in Germany for a long time.

On drainage see *Wurtz v. Hoagland*, 114 U. S. 615, 29 L. Ed. 229.

#### FUND FOR DAMAGES TO SHEEP.

In Connecticut, Wisconsin, Ohio and Michigan, legislation has been upheld the principle of which is on all fours with the compulsory insurance of deposits and the taxation of the expenses thereof to the banks. It is the legislation which levies a tax for the keeping of each dog upon its owner, and therefrom constituting a fund for the payment of damages resulting from such dogs.

*Tenny v. Lentz*, 16 Wis. 566.

*Van Horn v. People*, 46 Mich. 183.

*Holst v. Row*, 39 Ohio St. 340.

*Town of Wilton v. Weston*, 48 Conn. 325.

The first of these is *Tenny v. Lentz*, 16 Wis. 566. The laws of Wisconsin of 1860 provided for a license tax on dogs and gave an owner of sheep killed by dogs a right to be paid the damages thereof by the town in which the master of the dog lived, and the town was

reimbursed from the dog-tax fund. The court held that this was a proper exercise of police power. Here was a tax on certain property, to wit, dogs, or a license to protect the public from something connected with the activity of the dogs, that is, the loss of sheep, falling within the rule laid down by this court in the Gibbes case.

The next case, under the laws of Michigan of 1877, which appears in the case of *Van Horn v. People*, 46 Mich. 183. A charge was laid on the owners of dogs in the character of a tax to raise a fund out of which damages done by dogs to sheep were to be paid. It was held that this is not strictly a tax law, but an exercise of the proper police power of the state.

The next case is that of *Holst v. Row*, 39 Ohio St. 340. In that, likewise, section 2754 of the Revised Statutes of Ohio provided a license tax on dogs, and section 4215 provided that the special fund created by this tax should be devoted to the payment of losses sustained by owners of sheep killed by dogs, and the court held that this was a proper exercise of police power.

Again, *The Town of Wilton v. The Town of Weston*, 48 Conn. 325, was a case where the laws of Connecticut, providing that the damage done by dogs to sheep, lambs or cattle, proved to the satisfaction of the selectmen to have been committed in either town, shall be paid by such town and that the town might recover damage from the owner or keeper of the dog if a resident of such town; or, if of another town, of the town in which the owner or keeper lived. The funds thus to be paid out are to be realized not only by the right to sue the owner, but a special tax or license fee which the keepers of dogs are compelled to pay upon penalty of being criminally prosecuted raised the necessary revenue. This is set out at page 337 of the opinion. In this case exactly the same argument was made by the defendant as here by the complainant. In the brief for the plaintiff in error in that case it was said:

"The statute is invalid so far as it makes a town,

and, consequently, every inhabitant, responsible for damage done by dogs whose owners reside within the town. This is opposed to natural right and justice. It can be sustained only upon the theory that the legislature has the right to say that the property of a town, and of A, an inhabitant thereof, shall be taken to pay B; the power to impose by statute upon a corporation a claim which it was never concerned in creating, against which it protests, and which is unconnected with the ordinary functions of municipal government. But the courts have repeatedly declared that if the courts should order a city or town to apply its funds or raise money by taxation to establish one of its citizens in business, or for any other object, no matter how worthy, equally removed from the proper sphere of government, the usurpation of authority would not only be plain and palpable, but the duty of the court to declare the order void would be imperative."

And to this objection, being the very objection of plaintiff in this action, the court in that case said:

"But is the act valid in its method of accomplishing its object in view?

"And this brings us to the precise point of objection. Why require the town to assume the burden of paying the damages in the first instance, and the bringing suit to recover the amount either of the owner of the dog or the town where he happens to reside?

"The general answer is, that as a system of police regulation it cannot well be made effectual for the accomplishment of the objects except through some such agency on the part of the towns."

#### LAWS REQUIRING VESSELS TO CONTRIBUTE TO A FUND FOR DECAYED PILOTS HELD GOOD.

The case of *Cooley v. Property Wardens*, found in 12 Howard, 298, is one where the supreme court considered a law levying pilotage fees upon vessels, a portion of which was used for the relief of decayed pilots. On page 313 Mr. Justice CURTIS said:\*

"Nor do we consider that the appropriation of the sums received under this section of the act to the use of the society for the relief of distressed and decayed pilots, their widows and children, has any legitimate tendency to impress upon it the character of a revenue

law. Whether these sums shall go directly to the use of the individual pilots, by whom the service is tendered, or shall form a common fund, to be administered by trustees for the benefit of such pilots and their families as may stand in peculiar need of it, is a matter resting in legislative discretion, in the proper exercise of which pilots alone are interested."

Here was a case where the vessels paid part of the fees to the pilots themselves, and part of the fees that would go to the pilots went into a common fund for the benefit of all pilots. It may be said that the private property of these pilots was taken to be used for their benefit through compulsion for the private use of others.

#### CASES WHERE INSURANCE COMPANIES ARE COMPELLED TO SUPPORT FIREMEN.

There is another class of statutes passed by different states compelling the payment of fees by fire insurance companies, a certain part or percentage of which goes to a fund for the relief of firemen. We cite the following cases where the validity of such laws was considered and passed upon by the courts:

Phoenix Ins. Co. v. Fire Department of Montgomery, Ala., 42 L. R. A. 468.

Trustees of Exempt Firemen's Benevolent Fund v. Roome, 93 N. Y. 313.

Firemen's Ben. Assoc. v. Louisburg, 21 Ill. 511.

Fire Department of Milwaukee v. Helfenstein, 16 Wis. 142.

In the Alabama case the court considered the question of such a tax being a deprivation of private property for private purposes. On page 472 the court said:

"To justify the court in arresting the proceedings and declaring such a tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable—so clear and palpable as to be perceptible by every mind at the first blush."

This case discusses the principle involved as dis-

tinguished from the principle considered in cases like *Loan Association v. Topeka*, 20 Wallace, 663, and shows that the doctrine announced in the 20 Wallace case is the taking of property for a purely private purpose, where no *possible public interest is involved*.

In the Illinois case it was held that the enactment of such a law was under the police power upon a subject that the public had a general interest in and the individuals or classes upon whom the burdens are imposed had a particular interest in the performance of the acts.

REQUIRING RAILROADS TO PAY FEES FOR EXAMINATION  
OF EMPLOYEES' COLOR BLINDNESS.

"It is competent for a state to require the examination and verification by its officers of railroad operatives as to fitness, in those respects which involve public safety; and it may require the railroad company to pay the expenses of all acts and proceedings necessary to that end.

"*Morgan's La. & Tex. R. & S. Co. v. La.*, 118 U. S. 455 (30: 327); *Blair v. Milwaukee & P. R. Co.*, 20 Wis. 262; *New Albany & S. R. Co. v. Tilton*, 12 Ind. 3; *Jones v. Galena & C. R. Co.*, 16 Iowa, 6; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Waldron v. Rensselaer & S. R. Co.*, 8 Barb. 390; *Kansas Pacific R. Co. v. Mower*, 16 Kan. 573; *Gorman v. Pacific R. Co.*, 26 Mo. 441; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140; *People v. Squire*, 10 Cent. Rep. 437, 107 N. Y. 593."

*Nashville, Ch. & St. Louis R. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352.

A statute of Alabama declaring all persons afflicted with color blindness disqualified from serving on railroad lines, imposing a fine upon railroad companies employing them, and requiring employees to be examined and the railroad companies to pay the fees allowed for examination, held good.

*Nashville, Ch. & St. Louis R. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352.

The court held:

"Requiring railroad companies to pay the fees allowed for the examination of parties who are to serve on their railroads in one of the capacities mentioned is

not depriving them of property without due process of law."

The principle upon which such legislation is sustained is that the public has an interest in the subject of the laws, and that the regulation of the subject is a proper exercise of the police power of the state; and where the subject of legislation is of such public interest as to authorize the state to exercise this power, then the interest of the individual must give way to the interest of the public.

*If this, as a proper regulation of the banking business, warrants the state in the exercise of the police power to make such regulation, then all objections made by the individual that it is the taking of property without due process of law, that it denies the equal protection of the laws, or that it is a violation of the obligations of contracts, cannot be urged as against the power of the state to make such regulations as are for the public good.*

### THE DEPOSITOR'S CONTRACT WITH THE BANK.

In the previous oral argument, the question was raised as to the right of a depositor to insist that after a deposit is made the bank shall not in any way be by the state compelled to take any of its property to which the depositor had the right to look for the repayment of his deposit and divert it to some other use. We believe it is admitted that if this diversion is along the lines of bank control and the exercise of the police power, the depositor may not complain; but, on the other hand, it is contended that if it is not along the lines of bank control and the exercise of police power the individual depositor may complain of a misuse of some portion of the property of the bank. In the first instance, we do not believe these complainants are in a position to invoke the aid of this court upon that proposition. They say in their bill that they are and will be creditors and depositors in the different classes of banks. If they

are creditors and depositors in the different classes of banks, they become so of their own volition and in carrying out business plans which to them shall seem entirely proper and to their advantage. If they become creditors or depositors after a bank has received its certificate from the bank commissioner, after it is operating under the bank guaranty law, they become such with full knowledge that the bank will be required to pay a certain amount of money into the bank commissioner's office upon certain contingencies. They, therefore, would not be in a position to complain, as the bank's contract with the bank commissioner under the new law would be a part of their contract also.

On the other hand, if they are depositors or creditors (and so far as these complaining banks are concerned, under the averments in their bills, it means the same thing) at the present time, and leave themselves in that position without demanding the money due from those banks which qualify under this law, they become depositors in or creditors of such bank with full knowledge of the obligations of the bank under the law, and may not thereafter complain. The court will not presume that because a man or a bank is a depositor in another bank to-day he will remain so for any indefinite period in the future. *If these complaining banks, having deposits in a bank which qualifies under the guaranty law, do not desire to remain in that relation to the bank, it would be their duty to demand repayment of their money.* If it is repaid upon demand they have no cause of complaint, and the fact that the bank has taken a part of its funds and placed in another fund would not in any way damage them, if their contract is carried out in full with the bank. They could only raise this question upon insolvency, or upon a refusal of one of the qualified banks to carry out its previous contract with them, and as no such averment appears in the bills this court cannot take cognizance of these complaints by reason of these averments.

We also desire to call the court's attention to the fact



that the depositor in a bank has no specific lien upon any of the funds or property of the bank. The bank's contract with him does not go to the extent that the bank will keep on hand the exact money or retain the exact property it had at the time of the deposit, while the deposit remains in the bank. The bank may sell or otherwise dispose of its property. (*Lawrence v. Greenup*, 97 Fed. 906.) Any other rule would entirely destroy the commercialism of a bank, and destroy the objects for which it was organized. The only contract the depositor has with the bank is "payment on demand," and other creditors "payment when due."

This case must be tried upon the averments in the bills. The bill avers that the banks will be compelled, at stated intervals, to pay one-fifth of one per cent of their guaranteed deposits into the bank commissioner's office, for the purpose of adding it to the guaranty fund, and by reason of such payment and admission into the guaranty fund the bank's business and prosperity will be largely increased. The bill is full of averments to that effect, that a large increase in business, large increase in their assets and earnings, will necessarily come to the guaranteed banks, to the detriment of the unguaranteed banks. In fact, it is by reason of these averments the complainants are seeking relief here. If that be true (and we admit it is greatly to the advantage of the guaranteed banks) how may a depositor, whose only right is based upon the ability of the bank to carry out its contract of repayment with him, complain if the bank, by diverting a very small part of its property, brings to itself large amounts of property, and thus increases its ability to carry out its contract with him?

#### THE RECIPROCAL BENEFIT COMING TO THE BANKS OPERATING UNDER THE GUARANTY LAW.

A corporate body may be permitted by a state to do things which the state could not compel it to do. The state banks are permitted to loan money upon real estate security direct. The state could not compel

them to accept real estate security. Under the averments in the bill it clearly appears that by the payment of this money, this small assessment, the state banks derive great benefit. If they derive a practical value by way of insurance, or by way of increase of business, it cannot be said to be illegal or void. All corporate bodies have the right to advertise their business, and it is common history that they spend millions of dollars in advertisement of their business in newspapers, magazines and otherwise. In this they take a part of the assets to pay for this advertisement. The question as to whether they are wise and return a sufficient equivalent would in no way bear upon the legality or illegality of the expenditure. Banks are allowed to—in fact good business dictates that they should—insure their property. The premium is paid to an insurance company, and their property is insured by the policy. The insurance company, however, could not insure their property if they did not receive premiums from others; therefore, with the money which A. Bank pays for a policy of insurance the insurance company pays the loss sustained by B. Bank, and so on, without number, instances which might be brought to the attention of the court.

We do not claim the placing of this fund in a certain place to be used in case of the insolvency of a bank is exactly the same as taking an insurance policy, but we do say it is along the same lines, and that each bank which contributes to the fund does receive its indemnity.

The oft-repeated statement that the payments required of the banks operating under the guaranty law are mere gratuities for which the bank receives no benefit is not admitted as a statement of fact by the demurrer to the bills, and is not true in point of fact. Each bank entering into the fund receives a benefit far in advance of the amount of money contributed. In many different ways the bill avers that these participating banks would receive compensation by way of

additional deposits and increased business and profits. It is upon these facts they base their fears that it would result in the annihilation of national banks and such state banks as do not see fit to avail themselves of the privileges and benefits of the act. This benefit may be termed "insurance," "guaranty," "indemnity," "co-operation," or what not. The name is immaterial. The fact remains that the bank receives what it deems value received for the money expended.

Speaking upon this subject, WILLIAMS, C. J., for the court in *Noble State Bank v. Haskell*, 97 Pac. 607, said:

"Because the sovereignty, in the exercise of its police powers, grants or permits franchises to banking corporations, at the same time providing for the protection of all deposits placed therein by creating a depositors' guaranty fund, banking corporations being compelled to pay in a certain stipulated and prorated amount for the benefit of the depositors and for the public welfare, it does not follow that such payments are made by such banks without reciprocal compensation or benefit.

When contracts are made certain confidence is assured in business transactions. When deposits are made safe confidence in banks is assured. Then whatever protects the depositor protects the bank, because it assures confidence in the bank. And with the bank restricted in its operations by a rigid requirement of the law: careful inspection; frequent reports; ample reserve fund to be retained; limitation on the amount that may be loaned; no loan to be made to an active officer therein without criminal punishment being incurred; restrictions as to what the funds of the bank may be invested in—all of these limitations and safeguards thrown around the banking world should justify banks in having confidence in one another. Each bank having a reciprocal interest in the depositors' guaranty fund, thereby each has an incidental reciprocal interest in every other bank.

"The national, state, county, municipal and district governments, as a rule, require security for deposits. Why may not the same power be exercised to require the guaranty of the deposits of individuals? The national, state, county, municipal and district governments prescribe how their deposits shall be secured.

Why should not the government, in the exercise of the same power, prescribe how the banks should guarantee or secure the deposits of the citizens of the state? With the law enforced, the reckless, dishonest and incompetent banker cannot remain in business. The law closes the door of hope against him. For the *pro rata* amount each bank is required to deposit with the banking board to constitute the guaranty fund, every one gets a reciprocal benefit therefrom. For every dollar that a bank is compelled to pay into such a fund it receives a reciprocal protection and benefit, not only for itself, but also for its depositors; for what secures the depositor is certainly a benefit to the bank. It may not be so apparent in times of universal prosperity and contentment; but in the eras of depression and discontent the bank that has the assured confidence of its depositors should certainly be regarded as benefited, for there is no danger of any general and unnecessary withdrawal of deposits from the bank. The bank that can rest assured against such contingencies thereby receives a benefit. Consequently the guaranteeing of deposits occasions not only assurance to the depositor, but relief to the bank from any apprehension of an unnecessary run upon and withdrawals from the bank. Whilst such assessment for the guaranty fund goes to the protection of every other bank, as well as its own, yet every other bank receives a reciprocal benefit for its *pro rata* assessment paid into such fund, and thereby there is an equal reciprocal benefit to every bank in the state."

The history of the country always enters into the decision of every controversy of a public nature. It is common history that upon the failure of a bank, either large or small, in a city or village, business at once becomes stagnant. The merchant is unable to pay his daily bills because his money is tied up in the defunct bank. Very frequently the merchant is obliged to close his doors. The people who are depositors in other banks in the same community, or village, or city, become restive, dissatisfied and panicky. The result very frequently is that by reason of some unwarranted remark made upon the street a run is organized upon another bank, and it either withstands the run, to its

great detriment, or is forced in turn to close its doors. By reason thereof, other merchants fail to meet their obligations, and disasters follow thick and fast. Every person who has read the history of this country knows that the far-reaching consequences of a bank failure can hardly be estimated. Banks in one city are so connected with banks in another that they also are pulled down; and there is nothing which so disturbs business, the state or the community as a bank failure.

It is the public generally that is largely interested in the banks of the country as depositors. It is well known that no individual bank could withstand the loss of public confidence. The business of the bank is largely run upon credit and confidence. The laws, both state and national, recognize this fact by allowing their banks to loan a large percentage of their deposits, and in the requirement that only a small percentage of the deposits shall be retained in the bank. Therefore, no bank could withstand the demands of fifty per cent of its depositors, if they each demanded a repayment of their funds in full. Any law strengthening the confidence of the depositing public in a bank gives to that bank an enlarged capacity for doing business and an enlarged opportunity to earn dividends for its stockholders. In view of the history of banking, it is impossible to say that the contributing banks do not receive a direct compensation from the bank guaranty fund.

While the participating banks receive a direct benefit in returns for the money expended, there is a larger and more widespread benefit coming to the whole people, without regard to class, both depositors and non-depositors, bankers, farmers, merchants, and every other class, in the stability of prices and business. Business disturbances always cause fluctuations in prices, great or small, depending on the extent of the disturbance. A bank failure may affect the price of wheat, corn, cotton, hogs, cattle or other commodity. In this we are borne out by the history of the artificial panic of 1907,

when millions were lost on Wall Street, and by the producers, farmers, merchants and others, by reason of a panic caused entirely by lack of confidence. If this law strengthens confidence in banks, the compensation to the banks is unquestioned.

## CONCLUSION.

### REPEALING CLAUSE.

The plaintiff finds fault with the sixteenth section of the bank guaranty act, which reads as follows:

"All acts and parts of acts in conflict with this act are hereby repealed in so far as they so conflict, but no provision of any banking law or other statute of this state shall be construed to be amended, modified or repealed, except in so far as necessary to permit the unrestricted operation of this act as applied to banks participating in the privileges of this act."

The complainant says that nowhere in this act is there any provision for amendment or repeal of any section or part of the existing banking law of the state of Kansas. A very full discussion of this subject is found in *Southern Pacific Company v. Bertine*, 170 Fed. 735, pamphlet No. 6, dated September 2, 1909. The case was very similar to the one at bar in that it was not, and did not purport to be, amendatory of any other law. The learned judge in the decision, on page 739, quoted from *Sutherland on Statutory Construction*, at page 448, and says:

"A statute which in general terms repeals all acts and parts of acts inconsistent with its provisions is not amendatory."

### CONCLUDING REMARKS.

1. None of these complaining banks are entitled to the relief prayed for in the bill by reason of the fact that only incorporated banks are permitted to participate in the guaranty fund, because they are all incorporated banks and belong to the favored class;

2. Nor, by reason of the fact that private banks are excluded, because none of these complainants are private banks;

3. Nor, by reason of the fact that trust companies are excluded, because none of the complainants are trust companies;

4. Nor, by reason of the fact that banks with a surplus less than ten per cent of their capital are excluded, because the building up of a surplus fund is a regulation in the interests of safe banking, the amount required is reasonable and is a regulation clearly within the power of the state, the surplus being added to the value of the stock, and thus takes no property from the bank or the stockholders; and because, further, none of the complaining banks within this class have applied for and been refused admission to the benefits of the law;

5. Nor, by reason of the fact that banks which pay more than three per cent interest on time deposits are excluded, because there are no averments in the bills showing that any particular complaining bank belongs to that class;

6. Nor, by reason of the fact that banks which pay interest on savings deposits withdrawn before July or January first next following the date of deposit are excluded, because there are no averments in the bills that any of the complaining banks belong to that class;

7. Nor, by reason of the fact that banks organized after the passage of the act and not having been in business continuously for one year are excluded, because none of the complaining banks are thus situated, and, if they were, they could not complain after having taken their charter with this law upon the statute-books;

8. Nor, by reason of the fact that banks which pay interest on time certificates cashed before maturity are excluded, because none of the complaining banks belong to that class;

9. Nor, by reason of the fact that deposits upon which interest is paid on daily balances are excluded, because there are no averments in the bills showing

any of the complaining banks to belong to that class of depositors; and, for the further reason, that in making deposits in a bank they voluntarily select their own class;

10. Nor, by reason of the fact that deposits which are primarily rediscounts or money borrowed by the bank are excluded, because there are no averments in the bill showing that any of the complaining banks belong to this class of depositors, and because of the reasons heretofore specifically set forth in this brief;

11. Nor, by reason of the averments in the bill that all the assets of an insolvent bank, including the double liability of its stockholders, under the law, are applied first to the *guaranteed* depositors, because such averments are not true under the provisions of the act.

12. Nor can any of these complainants invoke the aid of this court in this case, because there are no sufficient averments in any of the bills to confer jurisdiction upon this court or to entitle them to the relief prayed for in the bill.

All of which is respectfully submitted.

F. S. JACKSON,

Attorney-general and solicitor  
for J. N. Dolley, bank commissioner,  
and Mark Tulley, state treasurer.

A. C. MITCHELL,

G. H. BUCKMAN,

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## Appendix.

### CHAPTER 61.

#### BANK DEPOSITORS' GUARANTY LAW.

Session Laws of 1909.

AN ACT providing for the security of depositors in the incorporated banks of Kansas, creating the bank depositors' guaranty fund of the state of Kansas, and providing regulations therefor, and penalties for the violation thereof.

*Be it enacted by the Legislature of the State of Kansas:*

SECTION 1. Any incorporated state bank doing business in this state under the general banking laws of Kansas, having a paid-up and unimpaired surplus fund equal to ten per cent of its capital, and any bank which may after the passage of this act be authorized to do business in this state, and which shall have been actively engaged in the business of banking for at least one year, and having such surplus fund, is hereby authorized and empowered to participate in the assessments and benefits and to be governed by the regulations of the bank depositors' guaranty fund of the state of Kansas hereinafter provided for; provided, that the limitation of one year shall not prevent such participation by a new bank at any time in any city or town in which all banks shall have neglected or failed to become guaranteed banks under the provisions of this act for a period of six months after the taking effect of this act. Before any bank shall become a guaranteed bank within the meaning of this act a resolution of its board of directors, authorized by its stockholders, duly certified by its president and secretary, asking therefor, in form to be provided by the bank commissioner, shall be filed with said bank commissioner, who shall, upon the filing of such resolution, make a rigid examination of the affairs of such bank, and if it is found to be solvent, to be properly managed and conducting its business in strict accordance with the banking law, he shall, after the bank shall have deposited with the state treasurer bonds or money as hereinafter provided, issue to such bank a certificate stating in substance that said bank has complied with the provi-

sions of this act, and that its depositors are guaranteed by the bank depositors' guaranty fund of the state of Kansas, as herein provided.

SEC. 2. Before receiving such certificate from the bank commissioner each bank entitled to the same according to section 1 of this act shall, as an evidence of good faith, deposit, and shall at all times maintain with the state treasurer (subject to the order of the bank commissioner when countersigned by the auditor of state) United States bonds, Kansas state bonds, or the bonds of any county, township, school district, board of education or city within the state of Kansas, to the amount of five hundred dollars for every one hundred thousand dollars or fraction thereof of its average deposits eligible to guaranty (less its capital and surplus) as shown by its last four published statements; provided, that each bank shall so deposit not less than five hundred dollars, and the state treasurer shall issue his receipt therefor in triplicate, one to the bank, one to the auditor of state, and one to the bank commissioner. Such bonds only shall be accepted as the school-fund commissioners of the state of Kansas are permitted to buy, and shall bear the certificate of the attorney-general of the state of Kansas stating that in his opinion said bonds have been legally issued. Said bonds, or cash in lieu thereof, shall not be charged out of the assets of the bank, except as hereinafter provided, but shall be carried in its assets under a heading "Guaranty Fund with State Treasurer" until such time as said bank shall default in payment of assessments hereinafter provided for. In lieu of bonds the bank, at its option, may deposit money, which deposits shall be exchangeable for acceptable bonds when the bank elects to make the substitution. In addition to above, each bank shall pay in cash an amount equal to one-twentieth of one per cent of its average deposits eligible to guaranty, less its capital and surplus, and the same shall be credited to the bank depositors' guaranty fund with the state treasurer subject to the order of the bank commissioner, and the state treasurer shall issue his receipt therefor in triplicate, one to the bank, one to the auditor of state, and one to the bank commissioner; provided, that the minimum assessment to be required from any bank shall be twenty dollars; provided further, that any bank seeking to participate in the assessments and benefits of this act after the first annual assessment for the year 1910 shall have been

made shall be assessed an amount approximately equal to its proportionate share of the money then in the bank depositors' guaranty fund after all losses shall have been deducted, the amount of such assessment to be determined by the bank commissioner. The last above mentioned assessment, however, shall not be required of new banks formed by the reorganization or consolidation of banks which have previously complied with the terms of this act. Upon the deposit and acceptance of such bonds (or money) and the payment of said assessment, then the payment of such deposits of said bank as are specified in this act shall be guaranteed as herein provided, and the bank entitled to its certificate.

SEC. 3. The bank commissioner shall, during the month of January of each year, make assessments of one-twentieth of one per cent of the average guaranteed deposits, less capital and surplus, of each bank (the minimum assessment in any case to be twenty dollars) until the cash fund accumulated and placed to the credit of the bank depositors' guaranty fund shall be approximately five hundred thousand dollars over and above the cash deposited in lieu of bonds, when he shall discontinue such assessments. Should such fund become depleted the bank commissioner shall make such additional assessments from time to time as may become necessary to maintain the same; provided, that not more than five such assessments of one-twentieth of one per cent each shall be made in any one calendar year. The treasurer of the state of Kansas shall hold this fund in the state depository banks as provided by law governing other state funds, subject to the order of the bank commissioner, to be countersigned by the auditor of state, for the payment of depositors of failed guaranteed banks, as hereinafter provided. The state treasurer shall credit this fund quarterly with its proportionate share of interest received from state funds, computed at the minimum rate of interest provided by law, upon the average daily balance of said fund.

SEC. 4. When any bank shall be found to be insolvent by the bank commissioner he shall take charge of such bank, as provided by law, and proceed to wind up its affairs; and he shall, at the earliest moment, issue to each depositor a certificate, upon proof of claim, bearing six per cent interest per annum, upon which dividends shall be entered when paid, except where a contract rate exists on the deposit, in which case the certificate shall bear interest at the contract rate;

notice of the amount of each dividend to be paid creditors and the date when such payment is to be made shall be published in two consecutive issues of a paper of general circulation in the county or city in which such failed bank is located, and a corresponding notice posted on the door of the receiver's office, and interest shall cease on each dividend on the day named in such notice. The bank commissioner shall likewise publish a notice of the date upon which he will make payments of any balance due on such proof of claim, and interest shall cease on the day so advertised, and said proof of claim shall so state. After the officer in charge of the bank shall have realized upon the assets of such bank and exhausted the double liability of its stockholders, and shall have paid all funds so collected in dividends to the depositors, he shall certify all balances due on guaranteed deposits (if any exist) to the bank commissioner, who shall then, upon his approval of such certification, draw checks upon the state treasurer, to be countersigned by the auditor of state, payable out of the bank depositors' guaranty fund, in favor of each depositor for the balance due on such proof of claim as hereinafter provided. If at any time the available funds in the bank depositors' guaranty fund shall not be sufficient to pay all guaranteed deposits of any failed bank, the five assessments herein provided for having been made, the bank commissioner shall pay depositors *pro rata* and the remainder shall be paid when the next assessment is available; provided, however, that whenever the bank commissioner shall have paid any dividend to the depositors of any failed bank out of the bank depositors' guaranty fund, then all claims and rights of action of such depositors so paid shall revert to the bank commissioner for the benefit of said bank depositors' guaranty fund, until said fund shall have been fully reimbursed for payments made on account of such failed bank, with interest thereon at three per cent per annum.

SEC. 5. A penalty of fifty per cent of the amount of said assessment shall be added to the assessment of any bank not remitting as aforesaid within thirty days after receipt of notice of such assessment from the bank commissioner, and if any bank which shall have been assessed and notified as aforesaid shall fail to remit the amount of said assessment as herein provided, a sufficient amount of its bonds (together with the unexpired

coupons) shall be immediately sold by the bank commissioner at public sale and the proceeds used to pay said assessment. Any balance remaining from the proceeds of such sale after the payment of such assessment shall remain to the credit of the bank in the depositors' guaranty fund. The said balance, together with the remainder of the bonds (or cash in lieu thereof) shall be forfeited to the bank depositors' guaranty fund if the bank does not, within sixty days from default in payment of such assessment, remit the full amount of such assessments and penalty to date, and restore the amount of its bonds, or money pledged, as evidence of good faith. Upon the bank's failure to remit its assessments according to the terms of this act the bank commissioner shall immediately examine such bank, and if it is found in his judgment to be insolvent he shall take charge of and liquidate said bank according to law. If said bank be found solvent, the bank commissioner shall cancel its certificate as a guaranteed bank and cause to be displayed in its banking rooms, in a conspicuous place, continuously for six months, a card not smaller than twenty inches by thirty inches and in large, plain type, reading as follows: "This bank has withdrawn from the bank depositors' guaranty fund and the guaranty of its deposits will cease on and after ———." The date on this card shall be a date six months after the first posting of such card. Any bank electing to withdraw from the bank depositors' guaranty fund may do so by giving notice to the bank commissioner and displaying a card as aforesaid, and at the expiration of the six months as aforesaid may receive its bonds (provided always that said bank shall have paid assessments in full to date) when the affairs of all failed banks in liquidation at the expiration of said six months shall have been closed up and the said bank shall have paid its assessments on account of same.

SEC. 6. Deposits which do not bear interest and the following deposits only shall be guaranteed by this act: Time certificates not payable in less than six months from date and not extending for more than one year, bearing interest at not to exceed three per cent per annum and on which interest shall cease at maturity; savings accounts not exceeding in amount one hundred dollars to any one person and not subject to check, upon which the bank has reserved in writing the right to re-

quire sixty days' notice of withdrawal, and bearing interest at not to exceed three per cent per annum. Deposits which are primarily rediscounts or money borrowed by the bank, and all deposits otherwise secured, shall not be guaranteed by this act. Each guaranteed bank shall certify under oath to the bank commissioner at the date of each called statement the amount of money it has on deposit not eligible to guaranty under the provisions of this act, and in assessing such bank this amount shall be deducted from its total deposit. The guaranty as provided for in this act shall not apply to a bank's obligation as indorser upon bills rediscounted, nor to bills payable, nor to moneys borrowed temporarily from its correspondents or others.

SEC. 7. Each bank guaranteed by this act shall keep a correct record of the rate of interest paid or agreed to be paid to each depositor, and shall make a statement thereof under oath to the bank commissioner quarterly. If a bank displays a card or in any manner advertises that its depositors are guaranteed, such bank, if it pays or agrees to pay, either directly or indirectly, interest at any rate greater than three per cent per annum upon deposits of any kind, class or character, shall state upon or in the same card or advertisement that no deposits are guaranteed which bear a greater rate of interest per annum than three per cent; and this portion of the advertisement must be in type of the same size as that used in stating that the deposits in the bank are guaranteed. No bank which pays interest at a rate greater than three per cent per annum on any form of deposit, or pays any interest on savings deposits withdrawn before July 1 or January 1 next following the date of the deposit, or on any time certificate cashed before maturity, shall be permitted to participate in the benefits of this act; provided, however, that any existing contracts for higher rates of interest entered into before the passage of this act may be carried out unimpaired, and such existing contracts shall not disqualify a bank to participate in the benefits of this act. Any managing officer of any bank guaranteed under this act, or any person acting in its behalf or for its benefit, who shall hereafter pay or promise to pay any depositor, either directly or indirectly, any rate of interest in excess of or in addition to the maximum rate of interest permitted by this act, or who shall, with intent to evade any of the provisions of this act, pledge the time cer-

tificate or other obligation of such bank as security for the personal obligation of himself or any other person, shall be guilty of a misdemeanor punishable by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment. The display of any card or other advertisement tending to convey the impression that the deposits of the bank are guaranteed by the state of Kansas, either directly or indirectly, shall be a misdemeanor and shall subject the offender to a fine of five hundred dollars, and any bank displaying a card or advertisement to the effect that its deposits are guaranteed by the bank depositors' guaranty fund of the state of Kansas when not authorized so to do under the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than five hundred dollars nor more than one thousand dollars.

SEC. 8. Any trust company heretofore organized under the laws of this state, and now in operation, may reorganize as a state bank under the laws of this state by filing with the secretary of state an amended charter signifying such purpose, to be approved by the Charter Board; and any private bank or national bank having the required capital and being otherwise qualified, may reorganize as a state bank; or any newly organized bank taking over the business of another bank, otherwise qualified, may immediately become a guaranteed bank by depositing bonds or money and paying its assessments and otherwise complying with the provisions of this act.

SEC. 9. A solvent bank, upon retiring from business and liquidating its affairs, shall be entitled to receive back from the state treasurer, after all the depositors in such bank have been paid in full, its bonds or money pledged, but not any part of any unused assessment that may be in the bank depositors' guaranty fund; provided, however, that should such bank be turning over its business to another bank it shall not receive back its bonds, or money deposited in lieu thereof, until the bank receiving its business shall have deposited with the state treasurer bonds, or money in lieu thereof, according to the requirements of this act.

SEC. 10. Banks may be permitted, in the discretion of the bank commissioner, to exchange their bonds for others acceptable under this act, or be allowed to de-



posit in lieu thereof an equal amount in cash, which may in turn be withdrawn upon the substitution of bonds acceptable under this act.

SEC. 11. If at any regular or special examination of a guaranteed bank it shall be found to be violating any of the provisions of this act, the bank commissioner shall notify the bank, and the bank may be given thirty days in which to comply with the provisions of this act; and if at the expiration of this time such provisions have not been complied with the bank commissioner shall cancel its certificate of membership in the bank depositors' guaranty fund as herein provided and forfeit its bonds deposited with the state treasurer for the benefit of the bank depositors' guaranty fund.

SEC. 12. All bonds, and moneys deposited in lieu of bonds, placed in the state treasury under this act shall be kept in said treasury separate from all other bonds and moneys and to the credit of the bond account of the bank depositors' guaranty fund, and shall be used for no other purpose. The state treasurer shall cause the coupons upon the said bonds to be cut thirty days before maturity and sent or delivered to the bank which deposited them; provided always, that said bank shall have paid all assessments in full to date.

SEC. 13. After the passage of this act any national bank doing business in the state of Kansas, under the laws of the United States, after an examination at its expense by the state bank commissioner, and upon his approval as to its financial condition, may at its option participate in the assessments and benefits of the bank depositors' guaranty fund of the state of Kansas upon the same terms and conditions as apply to state banks; provided, that such national banks shall forward to the bank commissioner of the state of Kansas detailed reports, in form to be provided by him, of its condition on the dates of the usual called statements of state banks (such reports not to be published except at the option of the bank), and shall submit to one examination each year by his department (or oftener in his discretion) as provided by the banking laws of the state of Kansas, and pay the usual fees therefor. Should a national bank disregard or refuse to comply with any recommendation made by the bank commissioner, in conformity with the provisions of this act, it shall immediately be subject to the provisions and penalties of this act and its certificate of membership in the bank depositors' guaranty fund shall be canceled.



SEC. 14. It shall be unlawful for any bank guaranteed under the provisions of this act to receive deposits continuously for six months in excess of ten times its paid-up capital and surplus, and the violation of this section by any bank shall cancel its rights to participate in the benefits of the bank depositors' guaranty fund, and work a forfeiture of its bonds deposited with the state treasurer for the benefit of such fund.

SEC. 15. For the purpose of carrying into effect the provisions of this act the bank commissioner shall provide forms and make requisition on the state printer for the necessary blanks, and all reports received by the bank commissioner shall be preserved by him in his office. The state treasurer is authorized to provide forms and make requisition on the state printer for the necessary blanks and record-books for his office.

SEC. 16. All acts and parts of acts in conflict with this act are hereby repealed in so far as they so conflict, but no provision of any banking law or other statute of this state shall be construed to be amended, modified or repealed, except in so far as necessary to permit the unrestricted operation of this act as applied to banks participating in the privileges of this act.

SEC. 17. This act shall take effect and be in force from and after June 30, 1909, and its publication in the official state paper.

Approved March 6, 1909.

Section 32, chapter 11a, Compiled Laws of 1901, being section 438, Compiled Laws of 1901:

"[438] *Declare dividends.* SEC. 32. The directors or owners of any bank doing business under this act may declare dividends of so much of the net profits of their bank as they shall judge expedient; but each bank shall, before the declaration of a dividend, carry one-tenth part of its net profits since the last preceding dividend to its surplus fund, until the same shall amount to fifty per cent of its capital stock."

Section 446, Compiled Laws of 1901:

"[446] *Collateral security.* SEC. 40. No bank, banker or bank officer shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security, except bonds of the United States, of the state of Kansas, or of some county, school district or municipality of the state of Kansas may be

deposited with the state treasurer as security for the deposit of state money; provided, that any bank may borrow money for temporary purposes not to exceed in amount fifty per cent of its paid-up capital, and may pledge assets of the bank not exceeding twenty per cent in excess of the amount borrowed as collateral security therefor; provided further, that whenever it shall appear that a bank is borrowing habitually for the purpose of reloaning, the bank commissioner may require such bank to pay off such borrowed money. Nothing herein shall prevent any bank from rediscounting in good faith and indorsing any of its negotiable notes. It shall be unlawful for any bank to issue its certificate of deposit for the purpose of borrowing money." (General Statutes of 1901, as amended by chapter 69, Session Laws of 1905.)

Section 461, General Statutes of 1901:

"[461] *Institute proceedings.* SEC. 55. If, after the expiration of one year from the closing of any incorporated bank, it shall appear to the receiver thereof that the assets of such bank are insufficient to pay its liabilities, it shall be the duty of such receiver to immediately institute proper proceedings, in the name of the bank, for the collection of the liability of the stockholders of such bank; all sums so collected to become a part of the assets of such bank and to be distributed *pro rata* to the creditors thereof, in the same manner as other funds. No action by any creditor against any stockholder of such bank for the recovery of such liability shall be maintained unless it shall appear to the satisfaction of the court that the receiver has failed to commence action as herein provided." (General Statutes of Kansas, 1901.)

Section 7, chapter 59, Laws of 1909:

"SEC. 7. That section 461 of the General Statutes of Kansas of 1901 be and is hereby amended to read as follows: Sec. 461. At any time after the closing of any incorporated bank it shall appear to the receiver thereof that the assets of such bank are insufficient to pay its liabilities, it shall be the duty of such receiver to immediately institute proper proceedings, in the name of the bank, for the collection of the liability of the stockholders of such bank; all sums so collected to become a part of the assets of such bank and to be distributed *pro rata* to the creditors thereof in the same

manner as other funds; provided, that all transfers of property by a stockholder after the closing of any such bank and before the payment of the double liability as provided by this act, shall be absolutely void as against said double liability. No action by any creditor against any stockholder of such bank for the recovery of such liability shall be maintained unless it shall appear to the satisfaction of the court that the receiver has failed to commence action as herein provided."

Sections 1 and 2, article 12, constitution of Kansas:

"§ 210. *Corporate powers.* § 1. The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed.

"§ 211. *Dues from corporations.* § 2. Dues from corporations shall be secured by the individual liability of the stockholders to the amount of stock owned by each stockholder, and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

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Argument for Appellants.

ASSARIA STATE BANK *v.* DOLLEY, BANK COM-  
MISSIONER OF THE STATE OF KANSAS.APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF KANSAS.

No. 617. Argued December 8, 1910.—Decided January 3, 1911.

*Noble State Bank v. Haskell*, ante, p. 104, followed to effect that a state statute establishing a Bank Depositors' Guaranty Fund and requiring banks to contribute thereto is not unconstitutional as depriving the banks of their property without due process of law or denying them the equal protection of the law.

A state law which affects the needed charges to cure an existing evil by creating motives for voluntary action instead of by compulsion, may still be a police regulation.

One who can avail of benefits given by a state statute cannot object to the statute as denying him equal protection of the law because he does not choose to put himself in the class obtaining such benefits.

The Bank Depositors' Guaranty Fund of 1907, of Kansas, is not unconstitutional as denying equal protection of the law because it applies only to banks which contribute to the fund, or on account of preferences between classes of depositors, or because incorporated banks with a surplus of ten per cent have privileges over unincorporated banks.

THE facts are stated in the opinion.

*Mr. John L. Webster, Mr. Chester I. Long and Mr. J. W. Gleed*, with whom *Mr. B. P. Waggener and Mr. John L. Hunt* were on the brief, for appellants: <sup>1</sup>

The so-called Bank Guaranty Law is not a regulation of either banks or banking. It is a law creating an insur-

<sup>1</sup> See also arguments in support of, and against, the constitutionality of the Depositors' Guaranty Fund Acts of Oklahoma in *Noble State Bank v. Haskell*, ante, p. 105, and of Nebraska in *Shallenberger v. First State Bank*, ante, p. 114.

ance scheme to be conducted by the State, and the expenses raised by general taxation. 27 Opin. Attorney General, 272. The insurer is the State.

The fund for the payment of losses is derived from premiums paid by banks and the fund for the payment of expenses from general taxation. These expenses will exceed the amount of annual premiums paid by all banks. Session Laws of Kansas, 1909, 18, 48.

The assured are the depositors. Nothing in which the banks have any beneficial interest is insured. The risk is the obligation of the bank to certain depositors. The loss is the amount of deposits which the assets of the banks and the double liability of their stockholders is insufficient to pay.

The premium-payers are banks (voluntarily) and taxpayers (compulsory).

Taxation for a private purpose is a taking of property without due process of law. Brannon, Fourteenth Amendment, 160; *Cole v. LaGrange*, 113 U. S. 1; *Loan Assn. v. Topeka*, 20 Wall. 655; Cooley, Taxation, 67; *Sharpless v. Mayor*, 59 Am. Dec. 759.

A statute to compel payment of debts is not a police regulation. *Gulf &c. Ry. Co. v. Ellis*, 165 U. S. 150. This law acts by way of gift—by taking the property of one and giving it to another. Police power is simply the enforcement of the maxim, *Sic utere tuo ut alienum non lædas*, and acts by way of restraint. Tiedeman, Police Power, § 1; Freund, Police Power, §§ 3, 8, 22.

An exercise of the police power can be justified only by the necessity of the public generally. This law benefits only a limited class of bank depositors. *Lawton v. Steele*, 152 U. S. 133; *Hume v. Laurel Cemetery*, 142 Fed. Rep. 553; *Colon v. Lusk*, 153 N. Y. 188; *State v. Redmon*, 134 Wisconsin, 89; *Fisher v. Woods*, 187 N. Y. 90.

This law does not depend upon the necessity of those benefited—the depositors—for its existence, because it may

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Argument for Appellants.

be put in action only by the voluntary act of private banking corporations. *Larabee v. Dolley*, 175 Fed. Rep. 365; *Tiedeman*, Police Power, § 1; *Freund*, Police Power, §§ 3, 8, 22; *Lochner v. New York*, 198 U. S. 45; *Chicago Ry. Co. v. Drainage Com'rs*, 200 U. S. 561; *Reduction Co. v. Sanitary Works*, 199 U. S. 306; *Gardner v. Michigan*, 199 U. S. 325; *Ritchie v. People*, 155 Illinois, 98; *People v. Stede*, 231 Illinois, 340.

The law is therefore not an exercise of the police power. No other public purpose justifies it. A public purpose is a governmental purpose. *Dodge v. Mission Twp.*, 107 Fed. Rep. 827, 830.

A governmental purpose is one for the accomplishment of which, as shown by history, governments were instituted. *Loan Assn. v. Topeka*, 20 Wall. 655; *Opinion of Justices*, 30 N. E. Rep. (Mass.) 1142.

Governments were not instituted for the purpose of insuring deposits or any other property interests.

Considered as an act for the relief of sufferers from bank failures or as an act to pay the debts of banks, the purpose of the act is private and not public. *Baltimore Ry. Co. v. Spring*, 89 Maryland, 510; *State v. Township of Osawkee*, 14 Kansas, 418; *Lowell v. Boston*, 111 Massachusetts, 454; *Loan Assn. v. Topeka*, 20 Wall. 655.

The classification under the law is arbitrary and not reasonable as to banks not having ten per cent surplus.

Classification must rest upon some difference which bears a reasonable and just relation to the act in relation to which the classification is proposed. *Gulf &c. Ry. Co. v. Ellis*, 165 U. S. 150, and cases cited; *Atchison &c. Ry. Co. v. Matthews*, 174 U. S. 96.

The act is for the benefit of depositors. Depositors in banks which have no surplus and which are therefore presumably the weaker banks, need the benefits of the law more than depositors in stronger banks. A classification which deprives them of the benefits of the law has an

unreasonable, rather than a reasonable relation to the object sought to be accomplished by the law. *State v. Goodwill*, 33 W. Va. 179.

Classification in accordance with the peculiarities of the bank with which the depositor does business and not in accordance with the needs of the depositor is arbitrary. *State v. Haun*, 61 Kansas, 146, 153.

The effect of this arbitrary classification of depositors will be to deprive banks having no surplus of their business and force them to liquidate. These allegations are admitted by the demurrer.

Deprivation of business is deprivation of property. *Osborn v. U. S. Bank*, 9 Wheat. 738.

The law therefore deprives banks which have not a ten per cent surplus of property without due process of law. *Hayes v. Missouri*, 120 U. S. 68; *Yick Wo v. Hopkins*, 118 U. S. 356; *Connolly v. Pipe Co.*, 184 U. S. 540; *Reagan v. Farmers' Co.*, 154 U. S. 362; *Cotting v. Stock Yards*, 183 U. S. 79; *State v. Goodwill*, 33 W. Va. 179; *McKinster v. Sager*, 163 Indiana, 671.

As to banks which have a ten per cent surplus, the alternatives offered are to refuse to insure their depositors and thus lose all their business, or to submit themselves to a law which will compel them to illegally use the money invested by their stockholders, and to illegally discriminate among depositors and creditors.

*Mr. F. S. Jackson*, Attorney General of the State of Kansas, and *Mr. A. C. Mitchell*, with whom *Mr. G. H. Buckman* was on the brief, for appellees:

The Kansas Bank Guaranty Law is a voluntary law and applies only to those who seek and obtain admission to its benefits, and therefore cannot take property without due process of law or deny equal protection of the laws. *Merchants' Bank v. Pennsylvania*, 167 U. S. 461; *Commonwealth v. Merchants' Bank*, 168 Pa. St. 309.

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The appellant banks have not presented by their bill such a state of facts as will work a justiciable injury to them. *Supervisors v. Stanley*, 105 U. S. 305; *Clark v. Kansas City*, 176 U. S. 114; *Smiley v. Kansas*, 196 U. S. 447; *Merchants' Bank v. Pennsylvania*, 167 U. S. 461; *Commonwealth v. Merchants' Bank*, 168 Pa. St. 309; *Turpin v. Lemon*, 187 U. S. 51; *Branton Co. v. West Virginia*, 208 U. S. 192; *State v. Smiley*, 65 Kansas, 240; *Marbury v. Madison*, 1 Cranch, 137; *Tyler v. Registration*, 179 U. S. 405.

The appellants, being all citizens of the State of Kansas, have not presented a state of facts which raises a controversy under the Constitution of the United States. *Metcalf v. Watertown*, 128 U. S. 586; *Tennessee v. Planters' Bank*, 152 U. S. 454; *Blackburn v. Portland Mining Co.*, 175 U. S. 571.

The banking business is a public business, and its regulation is within the police power of the State. Freund on Police Power, §§ 400, 401; Tiedeman on Limitation, § 194; *Blaker v. Hood*, 53 Kansas, 499; *State v. Richcreek*, 5 L. R. A. (N. S.) 878; *S. C.*, 77 N. E. Rep. 1085; *Bank of Augusta v. Earle*, 13 Pet. 519; Zane, Banks and Banking, §§ 8, 9; Morse on Banking, § 13; *Bank v. San Francisco*, 142 California, 246.

The Kansas Bank Guaranty Law is a regulation of banking and is a proper exercise of the police power of the State. Freund on Police Power, § 400; *Gundling v. Chicago*, 177 U. S. 183; *Lawton v. Steele*, 152 U. S. 133; *Marbury v. Madison*, 1 Cranch, 137; *Otis v. Parker*, 187 U. S. 606; *Chicago, B. & Q. Ry. Co. v. People*, 200 U. S. 561; *Powell v. Pennsylvania*, 127 U. S. 678.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by many state banks of Kansas to prevent the enforcement of the Kansas law



providing for a Bank Depositors' Guaranty Fund. The defendants demurred. The Circuit Court, while holding the act unconstitutional, dismissed the bill on the ground that the appellants did not show that their rights under the Constitution were infringed, and therefore did not state a case within the jurisdiction of the court. 175 Fed. Rep. 365, 375, 381, 382. The ground of complaint was that the law imposed certain conditions upon sharing the benefits and burdens of contributors to the Guaranty Fund, that the appellants would not or could not contribute, and that unless they did the effect of the law would be to drive them out of business. It was complained also that whereas theretofore the plaintiffs would have been entitled to share *pro rata* in the assets of an insolvent bank to which they had given credit, now depositors with such of their debtors as should go into the guaranty system would be preferred. Again, various conditions of the scheme not affecting the plaintiffs were pointed out as unreasonable and arbitrary, and the whole act was alleged to be unconstitutional and void. There was added a charge that the act required taxation to meet the expenses of carrying out the scheme. To all this the court replied that so far as the plaintiffs were concerned, it did not appear that they could not change their condition so as to enable themselves to contribute, and that the possible preference of other creditors was put as a pure speculation, it not being averred that any guaranteed bank indebted to any of the plaintiffs had failed, to which it might be added that the plaintiffs are free to withdraw their credits and collect their debts now. The charge as to taxation did not state a case under the Constitution, and violation of constitutional rights was the only ground for coming into the Circuit Court.

The case of *Noble State Bank v. Haskell*, just decided, *ante*, p. 104, cuts the root of the plaintiffs' case, except so far as the Kansas law shows certain minor differences from

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that of Oklahoma. The most important of these is that contribution to the fund is not absolutely required. On this ground it is said, and was thought by the Circuit Judge, that the law could not be justified under the police power. We cannot agree to such a limitation. If, as we have decided, the law might compel the contribution on the grounds that we have stated, it may try to bring about the same result by the creation of motives less compulsory than command and of disadvantages in holding aloof less peremptory than an immediate stop. We shall not go through the details of minute criticism urged by the appellants, in most if not all of which they are in no way concerned. Perhaps the most striking of these subordinate matters is the preference of ordinary depositors over other creditors, a preference that seems to be overstated by the appellants. This, obviously, is in aid of what we have assumed to be the one of the chief objects and justifications of such laws, securing the currency of checks. The ordinary deposits are those that are drawn against in that way. Another discrimination complained of is that against unincorporated banks and banks not having a surplus of ten per cent. But if the State might require incorporation it may give advantages to incorporated companies. It might provide that no banking business should be done except by corporations and that corporations should not be formed or continue with less than a surplus of ten per cent, both provisions being for the purpose of assuring safety. If instead of that it allows the plaintiffs to keep on without incorporation and with a smaller surplus they cannot complain that the safer banks will outstrip them as the result of the law. We think it unnecessary to discuss the case more at length.

*Decree affirmed.*